Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

HUMAN SERVICES PLAZA PARTNERSHIP,
Petitioner,

v.

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON MORTGAGE COMPANY;
THE HUNTINGTON COMPANY,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
With Appendix

ROBERT R. KRACHT (0025574)
COUNSEL OF RECORD
SCOTT H. KAHN (0006779)
MCINTYRE, KAHN, KRUSE &
GILLOMBARDO CO., L.P.A.
The Galleria & Towers at Erieview
1301 E. Ninth Street, Suite 1200
Cleveland, OH 44114-1824

(216) 579-4114
Attorneys for Petitioners

LEGAL ADVANTAGE - Appellate Service
432 Walnut Street * Suite 200 * Cincinnati, OH 45202
(800) 581-2252

328 pp

QUESTIONS PRESENTED

I. Is a party's right to Due Process abrogated where neither the trial court nor the Court of Appeals conducts a proper de novo review of the evidence when considering a post trial motion for judgment as a matter of law made pursuant to Civ. R. 50(b), Federal Rules of Civil Procedure?

II. If, in response to a defendants post trial motion for judgment as a matter of law, the prevailing party plaintiff does not file a post trial motion for judgment as a matter of law with respect to each claim asserted in its complaint and introduced into evidence at trial, (including all alternative theories of recovery), will the prevailing party be precluded from asserting those claims on appeal?

III. When a financial institution imposes conditions to the extension of credit in violation of 12 U.S.C. § 1972, et seq., are those violations rendered moot when the credit transaction is not consummated?

LIST OF PARTIES

The names of the parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner, Human Services Plaza Partnership, is an Ohio general partnership, at one time consisting of the following partners: Howard Shanker; Divco, Inc. (100% of the stock of Divco was owned by David D. Owen); and the Michael Shanker Trust. Divco, Inc. sold its interest to Howard Shanker in September 1989, prior to commencement of the lawsuit that is the subject of this appeal. The Respondents, The Huntington National Bank, The Huntington Mortgage Company and the Huntington Company, are wholly owned subsidiaries of Huntington Bankshares, Inc., a bank holding company, having its principal place of business at 41 South High Street, Columbus, Ohio 43215.

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D. Order of the United States Court of Appeals for the Sixth Circuit, Entered May 14, 1996.

E. 12 U.S.C. § 1972: Certain tying arrangements prohibited; correspondent accounts.

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G. Rules 11(a) and 11(b), Rules of the United States Court of Appeals for the Sixth Circuit.

H. Chapters 14, 16.3 and 16.4, Internal Operating Procedures of the United States Court of Appeals for the Sixth Circuit.

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Bank, et al., Amended Complaint (exhibits thereto omitted), Filed April 16, 1993.

J. HNB's advertisement in the November 11, 1987 issue of Crain's Cleveland Business (HSPP's Trial Exhibit 229).

K. HNB's commitment letter to HSPP, dated June 29, 1988, regarding the $825,000.00 loan for site assembly and business relocation in preparation of construction of office building located in Cuyahoga County, Ohio (HNB's Trial Exhibit D-45).

L. Commercial Loan Facility Request, dated June 24, 1998, regarding loan of $825,000.00 for site assembly and business relocation in order to construct a new office building for Cuyahoga County Welfare Department (HSPP's Trial Exhibit 6).

M. Executed HNB engagement letter, dated November 23, 1988, regarding the $23,500,000.00 loan (HSPP's Trial Exhibit 275).

N. HNB's transaction timetable for the $23,500,000.00 loan, dated November 28, 1988 (HSPP's Trial Exhibit 269).

O. Commercial Loan Facility Request, dated December 6, 1988, regarding the $23,500,000 Letter of Credit (HSPP's Trial Exhibit 10).

P. Pages 1, 32-34, and 43 of the draft Trust Indenture, dated December 5, 1988, and pages 1 and 3 of Exhibit A of same (excerpts from HSPP's Trial Exhibit 48).

Q. Letter of Credit and excerpts of attachments thereto, dated December 29, 1988 (HSPP's Trial Exhibit 219).

R. Commitment letter, dated December 30, 1988, regarding the $23,500,000.00 Letter of Credit. (HSPP's Trial Exhibit 17).

S. Jury Verdict of trial court, entered May 21, 1993.

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U. Excerpts from HSPP's closing argument before trial court.

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Z. Excerpts from the trial testimony of Roger Buxton, HNB Vice President, Commercial Lending Group, and Anthony Caruso's supervisor.

AA. Excerpts from the trial testimony of Thomas Whitman, an investment banker employed by HNB's Corporate Finance Department.

AB. Excerpts from the trial testimony of Carlton Hill, HSPP's expert witness on banking practices.

TABLE OF CITATIONS

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No.

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HUMAN SERVICES PLAZA PARTNERSHIP,

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THE HUNTINGTON NATIONAL BANK; THE HUNTINGTON MORTGAGE COMPANY; THE HUNTINGTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Human Services Plaza Partnership ("HSPP"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("Apdx.") at Apdx. A-1-18. The unreported opinion of the district court is reproduced in Apdx. B-19-99. The unreported opinion of the Court of Appeals concerning its

denial of HSPP's petition for rehearing en banc is reproduced in Apdx. D-103-104.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This appeal was timely perfected following rendition of the Court of Appeals' order denying HSPP's petition for rehearing en banc entered May 14, 1996.

STATUTE INVOLVED

The pertinent provision of the Bank Holding Company Act, 12 U.S.C. § 1972(1)(C) (the "Act") is set forth below:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement --
>
> (C) that the customer provide some additional property, or service to such bank other than those related to and usually provided in connection with a loan, discount, deposit or trust service; * * *

STATEMENT OF THE CASE

This action was commenced by HSPP against Respondents, Huntington National Bank, The Huntington Mortgage Company and Huntington Company (collectively "HNB") on May 4, 1990,[1] asserting claims for: (1) breach of a commitment to provide a letter of credit in the amount of $23,500,000, essential to the financing of HSPP's construction of a commercial building in Cleveland, Ohio (the "HSPP Building"), (2) partial performance; (3) promissory estoppel; and (4) claims premised on HNB's violations of the Act (Apdx. A-3) and others.

In late 1987, early 1988, Cuyahoga County needed to relocate its Welfare and Human Services Departments, located within the City of Cleveland, to another facility. HSPP offered to build the HSPP Building to house these county departments and proposed to lease the building to the County. Howard Shanker ("Shanker") (a general partner of HSPP) approached a commercial real estate loan officer of HNB, one Anthony Caruso ("Caruso"), regarding the prospect of HNB providing financing for the construction of the HSPP Building. Shanker had read HNB advertisements in a local business publication, wherein HNB represented that its "Relationship Bankers" not only made loans, but structured them as well. (Apdx. J-133.) An acquaintance of Shanker referred him to Caruso specifically. The "Relationship Banker" concept was important to Shanker, as he had no experience in projects as large as the one he was putting together for the County. Caruso was a HNB loan officer who represented both HNB and its affiliate, The Huntington Mortgage Company. (Apdx. B-22; Apdx. X-244-5.) The HSPP Building project was sought after by various lending institutions in the Cleveland area, and was considered by HNB to be the "hottest deal in town."

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[1]HSPP filed its Amended Complaint on April 16, 1993, hereinafter the "Complaint." (Apdx. I-112-132, exhibits thereto omitted.)

The financing necessary for the HSPP project consisted of a three phase project involving: (1) a site acquisition and development loan in the amount of $825,000; (2) a business relocation loan in the amount of $600,000; and (3) a loan or other financial backing in the amount of $23,500,000 for the construction of a 250,000 sq. ft. building (collectively the "Project"). Caruso and others with HNB proposed this financing package with the third phase to take the form of a letter of credit (the "LOC") (Apdx. Q-173-198). The LOC, to be issued by HNB in the amount of $23,500,000, was to secure repayment of bonds that HNB, as the placement agent, was to sell to third party investors on HSPP's behalf.

Caruso advised Shanker that if HSPP received a resolution from the County evidencing its commitment to enter into a lease for the proposed HSPP Building, HNB would provide the $825,000.00 site acquisition and development funds for the Project. The intent was that HNB would eventually finance the entire Project, including the commitment to provide the LOC. HNB required that the proposed lease be in form and content satisfactory to HNB.[2] In consideration for Caruso's promise that HNB would finance the entire Project (including the $825,000.00, the LOC for the construction of the HSPP Building, and an additional $600,000.00 to purchase a relocation site for Shanker's business), Shanker promised HNB, through Caruso, a first and last look at what competing financial institutions were offering, with the understanding that if HNB could meet or beat the competition, HSPP would take HNB's financing package. (Apdx. W-238-239.)

On June 6, 1988, the County gave HSPP a resolution to enter into a five-year lease of the proposed HSPP Building. (Apdx. B-23) Thereafter, on June 29, 1988, HNB (in accord with Caruso's oral promise) gave HSPP "its" $825,000.00 written loan commitment. This loan commitment provided funds for site acquisition and business

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[2]Apdx. B-24-25; Apdx. K-139, a commitment letter from HNB to HSPP, dated 6/29/88, regarding the $825,000.00 loan.

relocation expenses in connection with the Project. (Apdx. B-22-23) HNB also required Shanker to take on a partner, one David Owen ("Owen"), so that HSPP would have sufficient construction expertise to build the HSPP Building. By doing so, Shanker gave up 30% of his ownership interest in his real property and the HSPP Building. (Apdx. W-233-237; Apdx. B-26.) The primary source of repayment for the $825,000.00 loan was to be the construction loan for the HSPP Building from HNB. (Apdx. L-144.) HNB made and disbursed the $825,000.00 loan to HSPP, and the Project was underway.

Thereafter, HSPP continued to work with HNB on development of a budget and projections, dealing through Caruso and Thomas Whitman ("Whitman"), an individual who did private placement of securities for various affiliates of HNB.[3] From June through mid-November 1988, Caruso and Whitman proposed various forms of financing, including letter of credit enhanced bond issues to private investors. Whitman was responsible for structuring the transaction so it would be acceptable to HNB, and he proposed two financing methods which involved the sale of enhanced bonds. Both options were to be backed by an LOC issued by HNB. One type was known as a "Terminator," wherein the LOC would terminate upon the occurrence of certain conditions. The other type was known as a multi-option rate adjustable note ("MORAN"). (Apdx. B-26-28)

On or about November 8, 1988, Whitman and Caruso sent HSPP a letter agreement, which was a commitment to provide both placement services for the bonds and the LOC. Caruso told Shanker that if HSPP wanted HNB's LOC, HSPP would have to use Whitman's services to place the bonds. Caruso was to receive $117,250 as a fee from HNB for steering the bond placement to Whitman. (Apdx. Y-246-248.) The November 8 letter (Apdx. M-145-148) was not

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[3]Apdx. B-26. See also, (Apdx. N-149-155, a transaction time table dated 11/28/88) and Apdx. M-145-148. (Huntington Company engagement letter dated 11/23/88 (in which Whitman is represented as a member of the corporate financing departments for both Huntington National Bank and Huntington Company).

executed by HSPP at that time. However, at a subsequent meeting on November 23, 1988, between Caruso, Owen, Shanker and Whitman (who appeared by phone), it was agreed that HSPP would retain Whitman, and that HNB would provide the LOC to support a MORAN style transaction.[4]

It was agreed by all parties that HNB would provide a 78-month LOC, including 45 days' interest at 12%, which would support 7-day MORAN's, in consideration of a 1% LOC fee and 1.25% placement fee, to be secured by real property owned by HSPP (upon which HNB already held a mortgage) and the assignment of the rental payments due under the County Lease when executed (hereinafter "the Commitment"). All of the essential and material terms of the transaction were memorialized in HNB's internal Commercial Loan Facility request form dated 12/6/88 (Apdx. O-156-158), which was signed by Carl Alderman ("Alderman," the President of HNB), Caruso, and Roger Buxton, ("Buxton," Caruso's superior) (hereinafter the "Alderman Approval"). (Apdx. Y-250-252) Alderman had authority to approve loans to the maximum lending limits of HNB, which, at that time, exceeded 85 million dollars. (Apdx. X-242) Alderman's signature on a loan (or facility request) signified that further approval by a loan committee was unnecessary.

On or about November 30, 1988, Whitman, acting on behalf of HNB (as HSPP's placement agent), sold the bonds to Federated Research of Pittsburgh ("Federated"). HSPP's obligation to Federated for repayment of the bonds was to be secured by HNB's LOC. (Apdx. AA-267-272; Apdx. O-156-158 and Apdx. A-2) Both Whitman and Caruso advised HSPP that the bonds had been sold and Caruso specifically told Shanker that the HNB financing was a "done deal." (Apdx. AA-267; Apdx. W-241.) A closing schedule was prepared by HNB, scheduling the closing date of the execution of the loan and related financing documents on December 28, 1988. (Apdx. N-149-

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[4] The 11/8/88 engagement letter, as executed on 11/23/88, is found at Apdx. M-145-148.

155)

In preparation for the closing, extensive securities and financing documents were prepared, consisting of: (1) an 81 page Trust Indenture; (2) a Financial Advisory and Placement Agreement; (3) a Remarketing Agreement; and (4) a draft of the MORAN and the LOC, among others. These documents were prepared by HNB's attorneys and provided to both HSPP and Federated on or about December 5, 1988. The understanding of the parties was that any fine tuning of the documents would not affect HNB's commitment to provide the LOC. (Apdx. AA-284-286; Apdx. Y-257-258) In the interim, HNB authorized the demolition of the gas station (HNB's collateral for the $825,000.00 loan) to make way for the anticipated construction and ground breaking ceremonies. (Apdx. Y-249; Apdx. V-223) On or about November 30, 1988, Caruso received and approved the final drafts of the County Lease. The Lease also was then executed by HSPP on December 7, 1988, and by the County on December 19, 1988 (the "County Lease") (Apdx. B-25)

As the County Lease provided that time was of the essence, Caruso met with HSPP at Shanker's office after the close of business on December 12, 1988, and reassured HSPP that the transaction would close on time. (Apdx. Y-253-254) A few days later, on or about December 16, 1988, Buxton reviewed the Alderman Approval in its entirety with Shanker. Caruso and Shanker discussed a proposed modification to the Commitment, in which HSPP was required to engage the services of a Mr. Kelly as construction manager for the Project. HSPP agreed to the modification and provided written acceptance of same. Buxton admitted that on December 16, 1988, there was a meeting of the minds as to all of the primary terms of the financing between HSPP and HNB, including the addition of a construction manager. (Apdx. Z-260-264.)

On or about December 19 or 20, 1988, Buxton called Shanker and advised him, for the first time, that HNB would only issue $8,000,000.00 of the $23,500,000.00 needed for the LOC. HNB now

wanted to have third party participants provide the remaining $15,500,000.00 to fund the LOC. (Apdx. Z-259-260, 262, 264) At no time prior to this had the requirement of participants in the LOC been discussed, and this new requirement came as a surprise to all involved.[5] This new requirement was not "fine tuning" of the transaction, but was a whole new ball game. (Apdx. AB-288-289; Apdx. AA-281) This requirement meant that the transaction would not close on time, and created the very real likelihood that other LOC participants, if obtained, may request changes in the County Lease, which had been executed by Cuyahoga County on December 19, 1988. When apprised of the participation requirement, Whitman advised HSPP to go seek other lenders, as HNB had placed HSPP in "the Jackpot." (Apdx. AA-273-281-283)

HSPP immediately advised HNB that the participant requirement was an unacceptable breach of the Commitment. Buxton told Shanker that he would see what could be done about Shanker's concern. On or about December 29, 1988, Buxton called Shanker and told him that he would close the $600,000.00 relocation loan on December 30, 1988, as Caruso promised, and that he (Buxton) had a written commitment on the $23,500,000.00 LOC, which he would deliver at the same time.

When HSPP showed up to close the loan and receive HNB's December 30 commitment, Shanker agreed to close the $600,000.00 loan first as an accommodation to the Seller and other third parties that were present. Thereafter, Shanker was given the December 30th, $23,500,000.00 proposed commitment, which, to Shanker's surprise and dismay, still contained both the participant requirement and an exculpatory clause (not found in *any* other loan commitments prepared by HNB), providing for the release by HSPP of any and all claims it had against HNB, pertaining to any prior commitments. (Apdx. R-

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[5]The handwritten modification on the loan facility request form (Apdx. O-156-158) which stated: "subject to selling $15,500,000.00 Part. in L.C." was done unilaterally by HNB after HSPP accepted HNB's modification of December 16, 1988, and was added on December 19, 1988 (Apdx. Z-259-262, 264).

199-213) Shanker was so upset that this meeting had to be continued on another date. This was understandable, as Whitman, acting as HSPP's financial advisor, admitted that he would not have advised HSPP to sign the December 30, 1988 commitment. (Apdx. AA-280; Apdx. W-240)

After January 1, 1989, Shanker and his counsel met with HNB and its counsel to attempt to resolve the participant requirement issue. Shanker agreed to allow HNB to attempt to find participants, but refused to sign any commitment that would exculpate HNB from the breach of the original Commitment. (Apdx. V-224-226) HNB refused to remove the release from the Commitment letter, terms HNB had unilaterally imposed as a condition of extending credit to HSPP.[6] HSPP agreed to sign such a commitment only if HNB either found participants or removed the requirement of same. HNB continued to search for participants but ultimately failed to find them. (Apdx. B-34-35)

Thereafter, HSPP failed in its attempts to secure other financing. In order to mitigate its damages for failure to perform under the County Lease, HSPP entered into a settlement with the County wherein various aspects of the project were sold to the County. (Apdx. V-229-230) After the County settlement, Divco sold its partnership interest back to Shanker. (Apdx. V-231) As a result of HNB's breach and unreasonable conditioning of the extension of credit, HSPP lost a project, valued by HNB at $30,000,000.00 (Apdx. O-156-158), which could have been built by HSPP for $23,500,000.00. When offset against the County's settlement, HSPP suffered damages in the amount of $6,154,903, caused by HNB's breach. Moreover, HNB initiated foreclosure proceedings against Shanker on its mortgage securing repayment of the $600,000.00 loan.

The present action was tried before a jury commencing April 20,

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[6]HSPP subsequently alleged at trial that the addition of these terms were unusual banking practices, in violation of 12 U.S.C. § 1972.

1993, that lasted four and one half weeks. During the course of the trial, HSPP successfully opposed HNB's motion for directed verdict and its renewed motion for directed verdict, which were based on: (1) Caruso's alleged lack of apparent authority to bind HNB; and (2) Ohio's Statute of Frauds (Apdx. F-107). HSPP countered, arguing that evidence was introduced establishing the existence of a signed writing(s) and/or, in the alternative, that the parties' partial performance took the contract outside the Statute of Frauds, or that such was not applicable. (Apdx. U-219-220). The trial court denied both HNB's motion for directed verdict and its renewed motion for directed verdict.

Following deliberations, on May 21, 1993, the jury found that HNB held Caruso out as possessing the apparent authority to commit HNB to complete the financing transaction[7]. The jury found that, as a proximate result of the breach, HSPP sustained damages in the amount of $6,154,903.00, and entered their verdict in favor of HSPP. (Apdx. S-214.) Thereafter, on May 24, 1993, the trial court reduced the jury's verdict to judgment in HSPP's favor and against HNB (the "Judgment" Apdx. T). The Court then dismissed all remaining Counts, including HSPP's claims under the Act. Earlier the trial court had ruled as a matter of law that the insertions of an "entireties clause" and a release in Huntington's modified commitment letter were not an unusual banking practice in violation of the Act. As a result of that ruling, HSPP was prevented from eliciting testimony on that issue from its banking expert, Carlton Hill, and HSPP's claims under the Act were not presented to the jury.

Thereafter, on June 1, 1993, HNB filed a post-trial Motion for Judgment as a Matter of Law and for New Trial as to the jury's verdict and the Judgment. On June 8, 1993, HSPP filed a Motion for Judgment as a Matter of Law with respect to its claims under the Act (Count VII of the Amended Complaint, see Apdx. I-124-127).

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[7]Including the authority to negotiate, structure and fund (in whole or in part) the transaction.

On February 16, 1994, nine months after the verdict, and with only nominal excerpts from the 19 volumes of trial transcript available, the trial court issued its Memorandum and Order (Apdx. B-19-99), in which it reversed the decision of the jury and entered judgment in favor of HNB on Count II of the Amended Complaint. In another decision, the court denied HSPP's motion for judgment as a matter of law regarding its claims under the Act (Apdx. C-100-102). Contrary to the trial court's earlier decision dening HNB's motion and renewed motion for directed verdict, and without the benefit of the entire trial transcript, the trial court found that there was insufficient evidence to support the jury's finding that Caruso had apparent authority to orally commit HNB to issue the LOC. The trial court also found that the oral commitment to provide the LOC was a transaction that was required under Ohio's Statute of Frauds to be in writing signed by HNB, and that no such writing existed, thus baring HSPP's right to recover. As to HSPP's claims under the Act, the trial court failed to reconsider its previous decision preventing this claim from going to the jury. HSPP and Shanker timely appealed to the Sixth Circuit Court of Appeals.

On March 15, 1996, the Court of Appeals rendered its decision, in which it affirmed the decision of the trial court and concluded: (1) that there was insufficient evidence to support the jury's finding that Caruso had apparent authority to orally commit HNB to issue the LOC; (2) that any such oral contract had to be reduced to writing pursuant to Ohio's Statute of Frauds; and (3) that no writing existed to satisfy this requirement. (Apdx. A-3-4). As to HSPP's claims under the Act, the Court of Appeals found that since an enforceable parol contract did not exist, the basis for HSPP's claims under the Act no longer existed and the issue was moot. (Apdx. A-16-18). The Court of Appeals also found that HSPP's alternative theories of recovery, premised on part performance and promissory estoppel, were waived on appeal because HSPP did not raise them in its motion for judgment as a matter of law nor in the trial court.

HSPP timely filed a Petition for Rehearing en banc, arguing principally that the three judge panel that heard and decided the appeal

failed (like the trial court) to conduct a de novo review of the proceedings. HSPP argued that if a true de novo hearing had been performed, the decision reached by the panel would have been reversed, as substantial evidence was presented to the jury as to each of its claims, including evidence of part performance and promissory estoppel. This controverted the panel's finding that HSPP failed to assert such claims and/or introduce evidence regarding same at trial. On May 14, 1996, the Court of Appeals denied HSPP's Petition for rehearing. (Apdx. D-103-104).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal courts of appeals regarding whether the consummation of a lending transaction is a condition precedent to a violation of 12 U.S. C. §1972(1)(C). In the present case, the decision of the Sixth Circuit Court of Appeals is in conflict with decisions rendered by the Fifth and Tenth Circuits.

This added requirement places a lender in a position to demand illegal conditions in connection with proposed extensions of credit unrelated to the protection of the credit. If the transaction falls through (as in this case because the borrower vehemently objects to the improper conditions imposed), the lender is shielded from liability under the Act and also from claims on the underlying contract. Pursuant to the decision of the Court of Appeals, the lender is further shielded from liability because, in the absence of a signed writing, the contract is unenforceable under the applicable statute of frauds.

In addition, this Court should grant the writ in order to clarify a litigant's and the lower court's obligations under Civ. R. 50, Federal Rules of Civil Procedure. On appeal, HSPP argued that the trial court could not have conducted a de novo review of the evidence since its decision on Huntington's motion for judgment as a matter of law was issued before the trial transcript was available and filed of record. For the trial court to conduct a true de novo review, all evidence must be

before the Court at the time the determination is being made. Since the Court of Appeals is required to apply the same standard of review, it likewise was required to conduct a de novo review of the entire proceedings in the trial court. As argued by HSPP in its petition for rehearing, it is evident that the Court of Appeals omitted from its analysis key facts introduced into evidence. Had a true de novo review been conducted by either Court, HSPP believes that such evidence, and the inferences that could be drawn from same, would have supported the jury's verdict.

The decision by the Court of Appeals also imposes conditions on litigants not envisioned under Civ. R. 50, Federal Rules of Civil Procedure. The Court's decision, finding that HSPP waived its claims of partial performance and promissory estoppel because it failed to assert same in its motion for judgment as a matter of law, is not supported by case law or Rule 50 itself. This decision requires that the prevailing party at trial must seek judgment as a matter of law on all claims asserted in its complaint or be faced with a claim of waiver, even if it prevailed at trial and certain of those claims (as here) were premised on alternative theories of recovery. Since the jury found in HSPP's favor on its claim for breach of contract, HSPP was not required to move for judgment as a matter of law on part performance in order to take the contract out of the statute of frauds, (if applicable).

Moreover, HSPP's claim of promissory estoppel is an equitable remedy, providing an alternative means of recovery in the event HSPP did not prevail on its breach of contract claim. Since it prevailed on its breach of contract claim, HSPP had no basis to seek judgment as a matter of law on the alternative equitable remedy. By holding that HSPP waived certain arguments on appeal because it did not make a motion for judgment as matter of law on those issues, the trial court imposes requirements on litigants that are not found in Civ. R.50 (b). The court of appeals' decision now requires the prevailing party to file a 50(b) motion on every single claim for relief asserted in the case, or risk a determination that such claim was waived merely by not asserting same in a 50(b) motion.

In order for a party to have standing to assert a 50(b) motion, however, by Rule, that party must first file or move the trial court for a directed verdict at the close of the plaintiff's case. That motion must also be renewed at the close of all evidence before the case goes to the jury. Since HSPP was the plaintiff, it would not seek a directed verdict at the close of its case. Moreover, HSPP, as plaintiff, would not seek a directed verdict at the close of all the evidence, before the case is submitted to the jury. Thus, since a plaintiff, and HSPP in particular, would not be required to move the trial court for a directed verdict, the conditions precedent to filing a 50(b) motion would not exist. Since by rule, HSPP was not required to make such motion, it cannot be said that the rule mandates that HSPP move for judgment as a matter of law on all of its claims or risk waiving same. The Court of Appeals' ruling in this regard is clearly inconsistent with the express language of Rule 50, as promulgated by this Court and abrogates HSPP's right to Due Prosess as guaranteed by the United States Constitution.

I.

IS A PARTY'S RIGHT TO DUE PROCESS ABROGATED WHERE NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS CONDUCTED A PROPER DE NOVO REVIEW OF THE EVIDENCE WHEN CONSIDERING A POST TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW MADE PURSUANT TO CIV. R. 50(B), FEDERAL RULES OF CIVIL PROCEDURE?

Pursuant to the standards announced by the Court of Appeals, when considering a motion for judgment as a matter of law on appeal, the Court of Appeals' standard of review is, like that of the trial court, de novo. *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991) Like the trial court, the Court of Appeals must neither determine the credibility of witnesses, nor weigh the evidence, and is required to draw all inferences from the evidence in a light most favorable to the non-

moving party. A review of the Trial Court Decision and the Appellate Decision demonstrates that neither court conducted a de novo review of the evidence in contravention of HSPP's right to Due Process.

On appeal, HSPP argued that the trial court could not have conducted a de novo review of the evidence, since its decision on HNB's motion for judgment as a matter of law was issued nine months after the jury's verdict, but before the entire trial transcript was available to the trial court and filed of record. A true de novo review cannot occur unless the trial court has available to it the entire record for review. *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir., 1992) (it is wholly improper for a district judge to ignore evidence admitted at trial from its consideration in granting; a judgment notwithstanding the verdict), *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir., 1983) (when ruling on the sufficiency of evidence, the trial court must read the record as presented to the jury).

Since the Court of Appeals was required to apply the same standard of review, it likewise was required to conduct a de novo review of the proceedings in the trial court. As argued by HSPP in its petition for rehearing, it is evident that the Court of Appeals omitted from its analysis key facts introduced into evidence. Had a true de novo review been conducted by the Court, HSPP believes that such evidence, and the inferences drawn from same most favorable to HSPP, would have supported the jury's verdict and formed the basis for reversal of the Trial Court Decision. The apparent reluctance of the Court of Appeals to conduct a de novo review is directly related to the limitations placed on appellants by Local Rules of the Sixth Circuit Court of Appeals (Apdx. G). Local Rule 11(a) provides that the ". . . appendix is not intended to be a substitute for the record; the court has it available and will consult the entire record whenever it becomes necessary." Yet the Sixth Circuit Internal Operating Procedures ("IOP") expressly provides that "[I]t is unnecessary to designate the entire record of district court proceedings for transmission to the court of appeals particularly where the record is unusually voluminous."

The Local Rules and the IOP's admonish parties and counsel from designating the entire record, and in fact provide for the imposition of sanctions against parties and counsel for designating parts of the record the Court of Appeals may ultimately deem were unnecessary for appeal. See, (Apdx. G-108-109; Apdx. H-110-111). These rules are inconsistent with de novo review and deprive parties entitled to that standard of Due Process as guaranteed by the United States Constitution.

A review of the appellate decision (Apdx. A) illustrates the court's failure to conduct a de novo review. By limiting its consideration of the evidence, the inferences that could be drawn from that evidence were likewise limited. In fact, the Court of Appeals only considered one inference, and by doing so, it excluded from consideration all other inferences that could be reasonably drawn from the same evidence. The Court then failed to view inferences made in a light most favorable to HSPP. In this regard, the Court of Appeals stated that the "most favorable inference one could draw from the defendants' generalized advertisements about having Relationship Bankers, as well as the evidence of the partners' dealings with Caruso on the $825,000 loan, would be that Caruso had the apparent authority to structure financing for a commercial project and could orally commit the Bank to make a real estate related commercial loan for an amount at or below $825,000." (Apdx. A-7). The Court was clearly weighing the credibility of several trial witnesses, which is in contravention of its own stated standard of review. The Court of Appeals either ignored or overlooked the fact that HNB's advertisements were not "generalized" as suggested. Rather, they expressly represented that HNB's "Relationship Bankers" (Caruso) could structure and make loans. This view, when coupled with HNB's actual funding of the first phase of the Project, could reasonably lead the jury to infer that Caruso had the authority to complete the transaction. The jury could also reasonably infer from the facts that Caruso was permitted by HNB to undertake and partially fund the Project. This evidence was further corroborated by the testimony of HSPP's banking expert, Carlton Hill. The evidence introduced clearly supports the jury's verdict that the

transaction provided HNB with a mechanism by which the $825,000 loan could be repaid, as expressly provided for in HNB's Commercial Loan Facility Request form. (Apdx. L-144) This seems more reasonable than the Court of Appeals' conclusion, where HNB would make a loan without viable means of repayment.

In drawing its inference, the Court of Appeals found that Caruso had the apparent authority to commit HNB, but limited that authority to a finite sum of money, i.e., the $825,000 loan. It ignored all other inferences that the jury could have reasonably drawn, including the inference that Caruso had the authority to complete the task that he had been permitted to undertake, and which HNB had partially funded -- that is, to commit HNB to issue the LOC.

Had the trial court and the Court of Appeals conducted a true de novo review of all the evidence, and considered the entire record in a light most favorable to HSPP (including the testimony of Carlton Hill) the inference to be drawn would have been consistent with the jury's verdict. Mr. Hill testified that:

> Since the bank approved the 825 [$825,000 loan] and gave Mr. Caruso the authority to negotiate the 825, it also in effect approved the ultimate 20 million dollar credit simply because you don't loan money to build something . . . unless you give him the money to build the building and turn around and lease it, there is no way that 825 could be paid off. So in a sense the bank has already authorized and agreed to a 20 million dollar operation.[8]

By not considering Hill's testimony and other relevant evidence, both trial court and the Court of Appeals misconstrued the nature of the transaction, looking only to each individual part as opposed to the

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[8]Apdx. AB-287; Apdx. L-144; Apdx. K-134-143.

totality of the transaction.[9] The evidence introduced at trial permitted the jury to draw the inference that Caruso did in fact have the requisite authority to commit HNB to issue the LOC, or that HNB knowingly permitted Caruso, as a relationship banker, to act as though he possessed such authority. The Court of Appeals viewed this evidence in a light most favorable to HNB, not HSPP. Such a view of the evidence is contrary to the standard of review of 50(b) motions.

Additionally, had the trial court and the Court of Appeals conducted a true de novo review, it would have reached a different conclusion regarding HSPP's claim that the commitment to issue the LOC was not a transaction within the Ohio Statute of Frauds. In affirming the trial court's finding that the subject financing was within the Statute of Frauds, the Court of Appeals incorrectly stated that HSPP admitted that HNB's "promise to provide financing" is the promise which must conform to the Statute of Frauds (Apdx. A-9). HSPP's position throughout all stages of this proceeding was, and still is, that the commitment to provide financing is outside the Statute of Frauds and, therefore, no writing was necessary to enforce that commitment. Assuming arguendo that the transaction was determined to be within the Statute of Frauds, HSPP argued and presented evidence of two alternative theories: (1) that sufficient writings existed, signed by HNB evidencing the parties' agreement; and/or (2) part performance took the agreement outside the Statute of Frauds. (Apdx. U-219-20; Apdx. V-232) In this regard, HSPP argued that in a transaction involving a letter of credit, there are typically three independent oral and/or written contractual undertakings, to wit: (1) the contract between the issuing bank and its customer; (2) the contract between the issuing bank's customer and the beneficiary of the letter of credit; and (3) the actual letter of credit issued by the bank in favor of a designated beneficiary. The letter of credit is entirely independent

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[9]The Court of Appeals' misapprehension of the nature and scope of the transaction is evident from its statement: "The Partnership makes an elaborate argument that there are actually three contracts involved in this financing transaction, . . ." (Apdx. A-9).

of the other two contracts. As HSPP argued on appeal, only the contract between the issuing bank and the beneficiary of the letter of credit need be in writing to be enforceable. See, *Moorehouse v. Crangle*, 36 Ohio St. 130 (1880) (recognizing that when there is no debt to answer for, the obligation is not within the statute of frauds).

Both the trial court and the Court of Appeals incorrectly considered the actual LOC to be the definitive agreement, rather than HNB's commitment to provide the financing. If the actual LOC is the definitive agreement, the only parties in privity to that agreement were HNB and Federated (the party that purchased the bonds, the repayment of which was to be guaranteed by the LOC). Therefore, only Federated would have standing to sue HNB in the event HNB failed to honor its obligations under the LOC. As the evidence established, HSPP was not the beneficiary under the LOC contemplated under the transaction. Thus, the contract sought to be enforced by HSPP was not the LOC, but HNB's agreement to provide financing for the transaction (which included, as one of its component parts, the LOC.

The Court of Appeals stated in its decision that: "We are not convinced that the 'closing' of the loan is the totality of the 'performance' both parties were bargaining for in this financing transaction." (Apdx. A-9). By this statement, it appears that the Court of Appeals, on one hand, finally considered the totality of the transaction, while on the other hand limited the scope of the transaction and considered the LOC itself as the definitive document. By doing so, the Court of Appeals literally destroys the commercial value of financing commitments. This result will have devastating impact far beyond this case. If this decision is allowed to stand, a borrower will have no mechanism by which it can determine with certainty it can obtain financing prior to committing to the underlying business transaction that gave rise to the need for the financing in the first place. Binding financing commitments are an essential part of any commercial transaction.

By viewing the transaction in the manner it did, the Court of

Appeals then considered that the LOC, by its terms, contemplated performance over a period of 78 months. Since it did not contain an early payoff provision, it could not be performed within one year, and was therefore within the Statute of Frauds. The Court continued by requiring a signed writing in order for the Commitment to be enforceable. In reaching this conclusion, the Court of Appeals relied on the Ohio Supreme Court's recent holding in *Sherman v. Haines*, 652 N.E.2d 698, 700 (1995). Assuming, without admitting, that the LOC is the definitive agreement, the repayment and/or termination provisions relative to the LOC (although not expressly found within the LOC itself) expressly provided that HSPP had the option to redeem the bonds at anytime. HSPP could likewise obtain an "Alternate Letter of Credit" at HSPP's election, replacing the existing LOC.[10] Assuming

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[10]Although the LOC is silent on this issue, it incorporates a certain eighty-one (81) page Trust Indenture Agreement (relevant excerpts of which are found at Apdx. P-159-172) and related transactional documents pursuant to which the trustee, The Central Trust Company, was to hold the LOC to be issued by HNB, the bonds/moran notes and related transactional documents. Pursuant to ¶5.04 (3) (Apdx. P-161-162) of the Trust Indenture, the bonds secured by the LOC could be redeemed at the election of HSPP. Redemption could occur at anytime within the term of the transaction. Since redemption was at the election of HSPP, it could have occurred within one year of the date of the transaction. Moreover, ¶6.10 (Apdx. P-166-167) of the Trust Indenture provides that: "Company [HSPP] may provide for the delivery to the Trustee of an Alternate Letter of Credit having a term expiring no sooner than January 15, [1995]." In addition, Exhibit A to the Trust Indenture represents a draft Moran Note, where at page three of the note Apdx. P-170-171 it states that: " The Letter of Credit shall expire, subject to provisions for earlier termination, on January 15, 1995. * * * Subject to the provisions of the Indenture and the Reimbursement Agreement, the Letter of Credit may be replaced from time to time by another letter of credit (an "Alternate Letter of Credit") in which case the term "Bank" shall mean the financial institution issuing the Alternate Letter of Credit. . . . ." Finally, Exhibit A to the LOC itself (Apdx. P-170-171) represents a "Certificate of Acceptance of Alternate Letter of Credit," which would be executed and presented to HNB by the Indenture Trustee and HSPP upon obtaining a replacement letter of credit. The Court will note that the date on which the Alternate Letter of Credit becomes the LOC is intentionally left blank so that if HSPP elects this option and replaces the LOC with an Alternate LOC from any financial institution, that date can be inserted in the letter to HNB evidencing the effective date HNB's LOC is terminated and replaced by the Alternate LOC.

the actual LOC is at issue, and since HSPP could have caused its redemption or termination by way of early payoff and/or replacement of the LOC, the obligation could have been performed within one year. The transaction is therefore outside the scope of the Statute of Frauds. Neither the trial court nor the Court of Appeals considered this evidence, although it was admitted at trial and was a part of the record on appeal.

HSPP also argued in the alternative that there existed writings sufficient to satisfy the Statute of Frauds. A de novo review of the evidence would have led to consideration of the Alderman Approval, (HNB's internal Commercial Loan Facility Request form, signed by various officers of HNB, including its president)(Apdx. O-156-158), which commemorated each material term of the financing agreement and which was reviewed with and accepted by HSPP. The parties' agreement was further memorialized by the transactional documents prepared by HNB's counsel, which included a copy of the actual LOC. Accordingly, the Court of Appeals's failure to consider this evidence, together with the other writings, which, when taken together, clearly memorialized the parties' agreement and clearly evidenced writings sufficient to satisfy the Statute of Frauds, warrants review by this Court and ultimate reversal of the decisions of the lower courts, reinstating the jury's verdict.

II.

IF, IN RESPONSE TO A DEFENDANTS POST TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, THE PLAINTIFF AND PREVAILING PARTY AT TRIAL DOES NOT FILE A POST TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO EACH CLAIM ASSERTED IN ITS COMPLAINT, INCLUDING ALL ALTERNATIVE THEORIES OF RECOVERY, WILL THE PREVAILING PARTY BE PRECLUDED FROM ASSERTING THOSE CLAIMS ON APPEAL?

The appellate decision (Apdx. A) imposes an obligation on parties not envisioned by Civ. R. 50(b), Federal Rules of Civil Procedure. In addressing HSPP's arguments relative to its theories of partial performance (taking the Commitment out of the Statute of Frauds) and promissory estoppel, the Court of Appeals concluded that: (1) HSPP did not make these arguments at trial; (2) no document filed with the trial court mentioned these arguments; and (3) HSPP did not raise these claims and/or arguments in its motion for judgment as a matter of law, HSPP waived those arguments on appeal. (Apdx. A-14-15) The cases cited by the Court of Appeals in support of this contention, *FDIC v. Binion*, 953 F.2d 1013 (6th Cir. 1991) and *First National Monetary Corp. v. Weinberger*, 819 F.2d 1334 (6th Cir. 1987) both involved situations where the issue found to be waived was never raised at any stage of the proceeding below. A de novo review by the Court of Appeals of the entire record would have disclosed that HSPP consistently raised part performance as it related to HNB's assertion of the Statute of Frauds. Part performance appeared in HSPP's pleadings, evidence, and in opposition to motions for directed verdict during trial. HSPP pled, introduced into evidence, and specifically argued that part performance takes the contract outside the Statute of Frauds in opposition to HNB's motion for directed verdict.[11] In fact, counsel for HSPP argued that:

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[11] The pleadings and evidence introduced at trial was as follows: (1) HNB's requirement that Shanker take on Owen as, a partner in HSPP (to insure the project had the necessary expertise); (2) the $825,000 loan; (3) HNB's approval of demolition of the gas station (the collateral for the $825,000 loan) and the actual demolition of same; (4) HNB's loan to Shanker to relocate his business; (5) the performance of all conditions to the financing by HSPP including obtaining the County's resolution to enter a 5 year lease for the HSPP Building; (6) the preparation and execution of the lease with the County in accord with HNB's requirements; (7) engaging the services of Whitman to sell bonds at insistence of HNB; (8) soliciting bond sales to potential buyers w/ representations that the bonds were supported by the LOC; (9) the actual sale by Whitman of the bonds to Federated; (10) HSPP was obligated to enter into an exclusive dealing agreement with HNB; (11) final transactional documents were drafted by HNB's counsel, circulated to HSPP, Federated (bond buyer), and HNB.

> . . . since they are claiming that the statute of frauds in this regard applies to a real estate transaction, there has obviously been partial performance which removes it from the statute of frauds. Part performance is recognized as an exception to the statute of frauds with regard to real estate transactions.

(Apdx. U-220).

Not only was the Court of Appeals incorrect in it conclusions drawn from its limited and/or incomplete review, it misconstrued and misapplied HSPP's obligations, if any, under Civ. R. 50. Waiver in the context of a post-trial motion for judgment as a matter of law under Civ.R. 50(b) arises when the moving party has failed to move or renew its motion for directed verdict after the close of evidence. *Libbey-Owens-Ford Co. v. Insurance Co. Of North America*, 9 F.3d 422 (6th Cir. 1993) ("A party who has failed to move for a directed verdict cannot request the district court to rule on the sufficiency of the evidence supporting a verdict against him nor can he raise the issue on appeal." Id. at 426, citing *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514 (6th Cir. 1990). In the present case, HSPP, as the plaintiff, did not move for directed verdict at the close of its case in chief, nor at the close of all evidence. As such, HSPP was not a moving party within the meaning of Civ.R. 50(a). Moreover, HSPP, as the prevailing party at trial, likewise would not have sought reversal of the jury verdict by way of a Civ.R. 50(b) motion. By finding that HSPP waived part performance, after having raised the same at trial repeatedly and in opposition to a motion for directed verdict, the Court of Appeals has imposed a higher standard than that required by rule and current law.

Furthermore, even if HSPP did not raise part performance or promissory estoppel in opposition to HNB's renewed motion for judgment as a matter of law, the Court of Appeals decision in this case is inconsistent with its own precedent case law. *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988). *Gutzwiller* suggests that the failure to raise an argument in opposition to a Rule 50(b) motion will not result

in a waiver. In this regard, the Court in *Gutzwiller* stated that: "[t]he application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth.'" *Bonner v. Coughlin*, 657 F.2d 931, 959 (7th Cir. 1981) (quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1267 (1979)).

Finally, the Court of Appeals has cited no authority for the proposition that HSPP, as a non-moving party, had an obligation even to oppose HNB's Rule 50(b) motion. In fact, Sixth Circuit decisions interpreting Civ.R.50 require the trial court to conduct an independent de novo review of the entire record, not just those matters raised by the non-moving party in opposition to a Rule 50 motion.

Even if waiver applies to a non-moving party, and even if HSPP did not satisfy the requirement of first raising an issue in the trial court, HSPP argued that the Court of Appeals should consider HSPP's part performance and promissory estoppel claims because the failure to do so would result in manifest injustice. In this regard, HSPP cited relevant decisions of the Court of Appeals which hold that a federal appellate court is always empowered to resolve any issue not considered below "where the proper resolution is beyond any doubt or where injustice . . . might otherwise result." *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 477 (6th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990), citing *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 397 (6th Cir.1989), cert. denied, 495 U.S. 930, 110 S.Ct. 2169, 109 L.Ed.2d 499 (1990) (emphasis supplied). This power to consider an issue sua sponte is closely akin to the court's discretionary power to consider clear errors in a lower court's proceedings where the errors or omissions are obvious, unfair or undermine the integrity or public confidence of judicial proceedings. *See generally Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 920-21 (6th Cir.1991), and cases cited therein, and *Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir.1991). If the statute of frauds was applicable, by not considering HSPP's part performance and/or

promissory estoppel claims, manifest injustice has occurred.

III.

WHERE A FINANCIAL INSTITUTION IMPOSES CONDITIONS TO THE EXTENSION OF CREDIT IN VIOLATION OF 12 U.S.C. § 1972, ET SEQ., ARE THOSE VIOLATIONS RENDERED MOOT BECAUSE THE CREDIT TRANSACTION WAS NOT CONSUMMATED?

The Act, 12 U.S.C. § 1972, et seq. (Apdx. E-105-106) proscribes certain transactions by financial institutions in which the institution utilizes its economic leverage to condition its extension of credit on the customer's agreement to provide some additional credit, property or service to such lender, other than those related to and usually provided in connection with a loan. Sub-section (1)(C) of the Act provides in part that:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement --
>
> (C) that the customer provide some additional, property, or service to such bank other than those related to and usually provided in connection with a loan, discount, deposit or trust service; * * *

A violation of the statute is demonstrated by showing that the condition imposed was: (1) unusual; (2) resulted in an anti-competitive tying arrangement; and (3) benefitted the bank in a way other than merely providing additional asset protection. *Quintana v. First National Bank of Santa Fe*, 64 F.3d 670 (10th Cir. 1995); *Palermo v. First National Bank & Trust Co.*, 894 F.2d 363, 367-68 (10th Cir. 1990); *Alpine Elec. Co. v. Union Bank*, 979 F.2d 133, 135 (8th Cir. 1992).

HNB argued in the trial court that since HSPP did not execute the modified commitment containing the participation requirement and the exculpatory release provision, that the financing evidenced by the LOC was not issued. In the absence of a consumated transaction, HNB argued that no violation of the Act could occur.[12] On appeal, the Court of Appeals affirmed the trial court's dismissal of HSPP's claims under the Act on that basis, stating that ". . . an enforceable parol contract did not exist, the basis for the Partnership's assignment of error no longer exists and this issue is now moot." (Apdx. A-17-18). This holding is in conflict with the decisions of the Fifth and Tenth Circuits, both of which rejected similar arguments. *Amerifirst Properties, Inc. v. FDIC*, 880 F.2d 821, 823 (5th Cir. 1989), *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n*, 908 F.2d 578 (10th Cir. 1990) (construing the analogous statutory provisions governing thrift institutions, 12 U.S.C. § 1464 et seq., Thrift Institution Restructing Act).

In *Amerifirst*, the potential borrower obtained a loan commitment conditioned on the borrower's agreement to purchase unrelated real estate owned by the bank. The bank subsequently sold the real estate to another purchaser, then refused to honor its loan commitment. The bank took the position that in the absence of a consummated transaction, the borrower had no claim under the Act. The court of appeals held however, that Congress intended the phrase "extend credit" to include loan commitments in which the loan is never consummated. Id. at 823. The Fifth Circuit went on to state that the phrase "extension of credit" must be construed to accord with the underlying purpose of the anti-tying provisions of the Act. A particular practice should be considered an "extension of credit" if it "manifests the improper use of economic leverage that the Act seeks to prevent." Id. at 823 (citation omitted).

Given the additional requirement of a consummated transaction

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[12]The original trial judge, Judge Aldrich denied HNB's motion for summary judgment in which this very argument was first advanced.

imposed by the Sixth Circuit, the prohibitions contained in 12 U.S.C. §1972 (1)(C) are rendered a nullity. A borrower is left with essentially two alternatives: (1) consummate the transaction (and either live with the illegal conditions or sue the lender under the Act); or (2) reject the transaction. Under the first alternative, the likelihood of the aggrieved borrower to "bite the hand that feeds it" is slim to non-existent. As for the borrower's second alternative, the Sixth Circuit's requirement of a consummated transaction nullifies this alternative. As a result, a lender is free to utilize its economic clout to condition any proposed extension of credit in violation of the Act in an attempt to force the borrower, as in this case, to accept the condition or lose the deal. In essence, the lender can impose illegal conditions in violation of the Act with impunity. This result creates a serious, growing conflict among the federal circuit courts of appeals, and must be resolved by this Court.

Finally, the trial court's dismissal of HSPP's claims under the Act, and its subsequent refusal to grant judgment as a matter of law in favor of HSPP regarding those claims must be reversed. Whether the conditions HNB attempted to impose on HSPP relative to the modified commitment constituted an unusual banking practice was a question of fact for the jury's determination. *Quintana, supra.* 64 F.3d at 670. The trial court's decision to exclude the testimony of HSPP's banking expert was an abuse of discretion, warranting reversal of the decisions of the Court of Appeals and the trial court, and a remand back to the trial court for further consideration of HSPP's claims under the Act.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

McINTYRE, KAHN, KRUSE &
GILLOMBARDO CO., L.P.A.

ROBERT R. KRACHT (0025574)
Counsel of Record
SCOTT H. KAHN (0006779)
Attorneys for Petitioner
The Galleria & Towers at Erieview
1301 East Ninth Street, Suite 1200
Cleveland, OH 44114-1824
Telephone: (216) 579-4114
Facsimile: (216) 579-0605

OF COUNSEL:

McIntye, Kahn, Kruse
Gillombardo Co., L.P.A.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 94-3362/3365

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUMAN SERVICES PLAZA PARTNERSHIP;
HOWARD SHANKER,

Plaintiffs-Appellants,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON, MORTGAGE COMPANY;
THE HUNTINGTON COMPANY,

Defendants-Appellees and
Cross-Appellants.

BEFORE: MARTIN, NORRIS, and MOORE, Circuit Judges.

PER CURIAM. Determining that they had the skill to construct a building and lease it to the Cuyahoga County Welfare and Human Services department, three businessmen formed the Human Services Plaza Partnership for this project. Of the three original partners, only Howard Shanker is still involved in this litigation. Prior to forming the partnership in August 1988, the men sought funds for land acquisition and construction financing. Following discussions with approximately twelve financial institutions, the Partnership decided to work with Anthony Caruso, then a Vice-President with the Huntington Mortgage Company.[1]

On July 8, 1988, Caruso, Shanker and Shanker's partner, David Owen, executed a multi-page commitment letter for an $825,000 site assembly and business relocation loan. This transaction proceeded without complication. Negotiations continued between the parties regarding complete financing of the project, and the parties discussed a financing transaction whereby Huntington National Bank would issue a seventy-eight month, $23,500,000 Letter of Credit to insure payment of bonds to be sold to investors by The Huntington Company.

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[1] The defendants are three wholly-owned subsidiaries of Huntington Bancshares (not a party): The Huntington National Bank (a full service bank), The Huntington Mortgage Company (a mortgage agent for commercial construction projects), and the Huntington Company (an investment banking company).

On December 30, the Bank presented to the Partnership an eleven-page commitment letter in support of a Letter of Credit to be issued in the amount of $23,500,000. The commitment letter contained a condition that the Bank was limiting its participation to $8,000,000. The Partnership refused to sign the commitment letter. This litigation commenced because the Partnership claimed that Caruso had already orally committed the Bank in early November 1988 to issue the $23,500,000 Letter of Credit without a participation limitation.

On May 4, 1990, the Partnership filed suit in federal district court alleging, violations of the Bank Holding, Company Act, 12 U.S.C. § 1972, and stating several state law claims. On May 21, 1993, a jury returned a verdict for the Partnership on its breach of contract claim (Count II) only. The jury found that Caruso made an oral promise within the scope of his apparent authority committing the Bank to issue the $23,500,000 Letter of Credit. Both parties filed motions for judgment as a matter of law. Fed. R. Civ. P. 50(b).

In a fifty-three page opinion, the district court granted the defendants' motion for judgment as a matter of law and denied the Partnership's motion. In granting the defendants' motion, the district court concluded that there was insufficient evidence to support the jury's finding that Caruso had apparent authority to orally commit the Bank to issue this Letter of Credit. The court also determined that the oral contract had to be reduced to writing pursuant to Ohio's Statute of Frauds and that no writing, existed to satisfy this requirement. Both parties filed timely

appeals.[2] Because we agree with the district court's decision, we AFFIRM.

In reviewing a district court's decision to grant judgment as a matter of law under Fed. R. Civ. P. 50(b), we apply the same standard as the district court.[3] Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993). That standard is the same as for the "forerunner to this motion, the motion for judgment notwithstanding the verdict." Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 583 (6th Cir. 1994). Our task on appeal is to determine *de novo* "whether there [was] sufficient evidence to raise a question of fact for the jury." *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991) (citation omitted). In viewing the evidence, this Court must not engage in making

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[2] The defendants appealed because the district court chose not to rule on the defendants' request for a new trial, pursuant to Fed. R. Civ. P. 50(c). The court concluded that the request was moot. The defendants now "conditionally cross-appeal" the district court's decision not to rule on their new trial motion in the event this Court reverses.

[3] In this case our jurisdiction is based on the federal claim and our jurisdiction over the state law claims is supplemental. 28 U.S.C. § 1367(a) (Supp. II 1990). Therefore, on review we apply the federal law standard for deciding whether to grant a Fed. R. Civ. P. 50(b) motion. If our jurisdiction were predicated on diversity of citizenship, we would look to Ohio law for our standard of review. See Preferred RX Inc. v. American Prescription Plan, Inc., 46 F.3d 535, 543 (6th Cir. 1995) (applying New York's standard for reviewing judgment as a matter of law in a diversity case); Construction Interior Sys., Inc. v. Marriott Family Restaurants, Inc., 984 F.2d 749, 753 (6th Cir.), *cert. denied*, 114 S. Ct. 194 (1993) (stating that this court applies the state courts' standard in reviewing a motion for judgement as a matter of law in a diversity case); Potti v. Duramed Pharmaceuticals, Inc, 938 F.2d 641, 645 (6th. 1991) (applying Ohio's standard for "judgment as a matter of law").

credibility determinations, or weigh the evidence, but must draw all inferences in a light most favorable to the non-moving party. *Id.* We affirm if "there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ." Monette v. AM-7-7 Baking Co., Ltd., 929 F.2d 276, 280 (6th Cir. 1991) (citation omitted). As to a district court's interpretation of state law, our review is *de novo*. Spence v. Miles Lab., Inc., 37 F.3d 1185, 1188 (6th Cir. 1994) (citing Salve Regina College v. Russell, 499 U.S. 225, 231 (1991)).

The Partnership raises four issues on appeal. First the Partnership contends that the district court erred in deciding that there was insufficient evidence to support a finding that Caruso had apparent authority to orally commit the Bank for a $23,500,000 Letter of Credit. The district court concluded based on the evidence presented at trial that a jury could not reasonably infer that the Bank held Caruso out as having the authority to orally commit the Bank to issue a $23,500,000 Letter of Credit. We agree.

Where apparent authority of an agent to bind a principal is at issue, the evidence must show:

1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and

2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.

Master Consolidated Corp. v. BancOhio National Bank, 575 N.E.2d 817, 822 (Ohio 1991); *see also*, Ameritrust Co. National Assoc. v. Hicks Dev Corp., 632 N.E.2d 939, 942 (Ohio Ct. App. 1993) (stating that "[t]he existence and scope of apparent authority are determined by virtue manifestations of the principal rather than those of the putative agent") (citation omitted). Especially relevant to this case, Master Consolidated requires a Bank to hold out an agent or to knowingly permit an agent to act as having sufficient authority to "embrace *the particular act* in question." 575 N.E.2d at 822 (emphasis added).

The Partnership argues here, as it did to the district court, that the Bank held Caruso out as a "Relationship Banker," a person having the authority to orally commit to any transaction he structured, and relies on Caruso's alleged statement that the financing was a "done deal." The Partnership also relies on their prior dealing, with Caruso with regard to the $825,000 loan as sufficient proof of a "holding out" regarding Caruso's alleged $23,500,000 Letter of Credit lending authority. The Partnership argues that Caruso made an oral commitment to make the first loan and that "this action was thereafter ratified by [the Bank] by providing the $825,000 loan....It was reasonable for the jury to conclude that [the Partnership] learned from the first experience with Caruso that when he made an oral promise, [the Bank]

honored it, and that he could be trusted." *Appellants' Brief*, p. 21. Finally, the Partnership contends that a jury could infer that Caruso had apparent authority to approve the Letter of Credit because the Partnership had no way of knowing Caruso's actual authority due to the confidentiality of the Bank's internal loan approval process.

We agree with the district court that the evidence does not support a finding that the *defendants* held Caruso out as having authority to orally commit the Bank to issue a $23,500,000 Letter of Credit. The most favorable inference one could draw from the defendants' generalized advertisements about having Relationship Bankers, as well as the evidence of the partners' dealings with Caruso on the $825,000 loan, would be that Caruso had the apparent authority to structure financing for a commercial project and could orally commit the Bank to make a real estate-related commercial loan for an amount at or below $825,000. Nevertheless, the Partnership insists that it was reasonable for the jury to conclude that if Caruso made an oral promise for a $23,500,000 Letter of Credit the Bank would honor it.

None of this evidence permits reasonable minds to conclude that Caruso had the apparent authority to orally commit the Bank to issue a $23,500,000 Letter of Credit. Furthermore, Caruso's enigmatic comment about the financing being a "done deal" is a "holding out" by the agent and not the principal, as required by Master Consolidated, 575 N.E.2d at 822. Finally, we strongly disagree with the Partnership's claim that it would be

reasonable to infer that Caruso had apparent authority to approve a loan of over $23,000,000 based on the Partnership's ignorance of the extent of Caruso's actual authority. The Bank's action in keeping Caruso's actual authority a confidential matter is not a "holding out" of Caruso as having any type of apparent lending authority whatsoever. Because we find no evidence to support the jury's verdict as to the first prong of Master Consolidated, we need not address the issue of whether the partners could have believed, in good faith, that Caruso had the apparent lending authority to commit the Bank to issue a $23,500,000 letter of credit.

We also agree with the district court's decision to grant judgment as a matter of law on the ground that Ohio's Statute of Frauds was not satisfied. The pertinent section of Ohio's Statute of Frauds, **Ohio Rev. Code** § 1335.05 provides:

> No action shall be brought whereby to charge the defendant...upon a special promise, to answer for the debt, default, or miscarriage of another person...or upon an agreement that is not to be performed within one year from the making thereof: unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

The Partnership makes an elaborate argument that there are actually three contracts involved in this financing transaction, but ultimately admits that the Bank's "promise to provide financing" is the promise which must conform to the Statute of Frauds. *Appellants' Brief* at 3, 35. As stated in their breach of contract claim, the "financing" was the Letter of Credit "loan" to the Partnership. Complaint, J.A. at 81-82. The Partnership next contends that the "financing" was to close by December 30, 1988, or within forty-five days of the oral commitment to provide the Letter of Credit, thus making this oral promise one that was to be performed within one year and therefore unenforceable without a writing. The Partnership has also represented to this Court that the financing was a seventy-eight month Letter of Credit. *Appellants' Brief* at 7. While the precise terms of this Letter of Credit are not clear, it appears from the parties' briefs, as well as from the November 8 letter alleged by the Partnership to contain the terms of the contract, that both parties contemplated performance after the closing date. We are not convinced that the "closing" of the loan is the totality of the "performance" both parties were bargaining for in this financing transaction.

The central question in this case, then, is whether a seventy-eight month Letter of Credit is a contract which may not be performed within one year, thus requiring a writing. Clarifying longstanding Ohio law, the Ohio Supreme Court in Sherman v. Haines, 652 N.E.2d 698 (Ohio 1995), observed:

> For over a century, the "not to be performed within one year" provision of the Statute of

> Frauds, in Ohio and elsewhere has been given a literal and narrow construction. The provision applies only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Thus, where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds.

Id. at 700 (citations omitted). Applying, this interpretation of the Statute of Frauds to a loan transaction, Haines held that an alleged oral agreement providing that the appellant would pay a $3,000 debt in monthly installments of $25.00 was, by its express terms, an agreement that necessarily required one hundred and twenty months to perform. Because the term was not indefinite and the parties had not agreed to an early payoff option, the Ohio Supreme Court held that this contract had to be in writing to be enforceable. *Id.* at 701.

The Partnership cites no Ohio case law to support their contention that this seventy-eight month letter of credit might possibly be performed within one year. The defendants cite Vukelic v. Unibank, 1992 WL 214470 (Ohio Ct. App. 1992) (unpublished). There is a paucity of Ohio law on point, and Vukelic is the most analogous authority on these facts. In Vukelic, the plaintiff claimed that the defendant orally committed to issue a letter of credit which was to function in the place of a

surety bond guaranteeing plaintiff's construction of two municipal building projects that would take more than a year to complete. The Ohio Court of Appeals concluded that "it is undisputed that the letter of credit would have to last more than a year. Thus, by statute and as matter of law, there is no contract to issue a letter of credit unless it exists in writing and is signed by the issuer." *Id.* at *3 (citation omitted).

In this case, the record shows that the $23,500,000 Letter of Credit was to last at least until January 15, 1994, and that persons entitled to draw on the letter could do so until 10:00 a.m. on that date. J.A. at 1128 (Commitment Letter, December 30, 1988); J.A. at 1436 (Preliminary Discussion Material, October 22, 1988) (Letter of Credit to expire five years after Notes issued). The payment schedules listed in the Preliminary Discussion Material show that Partnership would be liable for annual fee payments for the Letter of Credit and the defendants represent that the Partnership was to pay a fee of $235,000/year for the Letter of Credit. *Appellees' Brief* at 9. The Partnership has not directed our attention to, nor can we find, an early termination provision or a contingency showing that performance might be possible within a year.[4] Therefore, as a matter of law,

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[4] One style of financing considered but rejected by the parties was known as a "Terminator" type. A "Terminator" Letter of Credit would terminate upon the occurrence of certain conditions. The other type, of financing contemplated by the parties was known as a multi-option rate adjustable note (MORAN). *Appellants' Brief* at 6. The Partnership asserts that the Letter of Credit was not to be a "Terminator" type, as described in Exhibit B to the November 8 letter, but a MORAN type. Therefore, we need not consider whether the conditions listed in Exhibit B might have caused the Letter of Credit to be terminated within one year.

this seventy-eight month letter of credit must be reduced to a writing sufficient to satisfy Ohio's Statute of Frauds.

The Partnership argues that a writing to satisfy the Statute of Frauds exists-the November 8, 1988 letter from the Bank, initialled by Caruso, Shanker and Owen on November 23. J.A. at 1390 (November 8 letter). However, this letter is not a writing or memorandum which satisfies Ohio's Statute of Frauds. By its terms, this letter is a preliminary negotiating document. Quoting a leading Ohio Supreme Court case on the requirements of a writing to satisfy the Statute of Frauds, the Ohio Court of Appeals in Beggin v. Fort Worth Mortgage Corp. has stated:

> The memorandum in writing which is required by the statute of frauds [R.C. 1335.05] is a memorandum of the agreement between parties, and it is not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing, to which it refers, without the necessity of resorting to parol proof.

638 N.E.2d 604, 608 (Ohio Ct. App.), *appeal not allowed*, 637 N.E.2d 11 (Ohio 1994) (quoting Kling v. Bordner, 61 N.E. 148, 148 (1901)) (other citations omitted); accord Schafer v. Faylor, 60 N.E.2d 339, 341 (Ohio Ct. App. 1944).

The November 8 letter, as a matter of law, does not satisfy the Ohio Statute of Frauds because by its terms it is a preliminary document; it does not purport to set forth the terms of the parties' agreement with certainty. The November 8 letter includes the following paragraph:

> A Preliminary Summary of Proposed General Terms is attached as Exhibit B.... The final terms and conditions of the Notes may vary from this preliminary summary, subject to negotiation and acceptance by you and all other parties to the transaction.

In addition, Exhibit B to the letter contains a paragraph stating that the Bank will issue the Letter of Credit "subject to final approval and acceptance of all legal documentation," J.A. at 1394, and also contains two conflicting dates-January 1996 (J.A. at 1394), and January 15, 1994 (J.A. at 1396)--regarding the termination date for the Letter of Credit. This express language shows an intent by the Bank that the terms in this letter are not final. Also, the dates conflict and it is not clear from the letter which date the parties agreed upon. Furthermore, the Partnership admits that this letter does not contain one essential term--the style of financing. "While [the November 8 letter], Attachment B, describes a Terminator transaction, it is undisputed that the parties had agreed to a MORAN style transaction on November 23, 1988." *Appellants' Brief* at 7. To be a writing that satisfies the Statute of Frauds, the writing must contain all essential terms or refer to another writing, containing the missing terms without

resort to parol proof Here, the November 8 letter does not refer to another document containing the acted to MORAN style financing term. Soteriades v. Wendy's Inc., 517 N.E.2d 1011, 1015 (Ohio Ct. App. 1986) (stating that a document signed by the party to be charged must refer to other documents containing absent or material terms). The parties alleged oral agreement on this term on November 23 is exactly the type of proof of an essential term that cannot be relied upon to satisfy the Statute of Frauds.

While the district court rejected this writing as satisfying the Statute of Frauds on several grounds, the district court's decision was correct because the November 8 letter explicitly states that it is a preliminary summary of the terms to be contained in the Letter of Credit, and therefore does not contain the essential terms of the agreement expressed with "clearness and certainty." A court interpreting this contract would not know what terms the parties had agreed to due to the tentative and indefinite nature of this letter. Furthermore, the dates are inconsistent and the style of financing term was agreed to orally.

The Partnership next contends that several acts of partial performance take the Letter of Credit out of the Statute of Frauds. The defendants counter that the Partnership did not make this argument to the trial court. No document filed with the district court contains the "part performance" argument including the Plaintiffs Memorandum in Opposition to Defendants' Motion for Judgment as a Matter of Law filed with the district court on June 28, 1993. This Memorandum should

have contained the Partnership's "part performance" argument in response to the defendant's contention in its motion for judgment as a matter of law that the contract did not conform with Ohio's Statute of Frauds. Having failed to raise this argument to the district court, the argument is waived on appeal. Federal Deposit Ins. Corp. v. Binion. 953 F.2d 1013, 1018 (6th Cir. 1991) (defendant failed to respond to plaintiff's motion for attorney's fees); First National Monetary Corp. v. Weinberger, 819 F.2d 1334, 1339 (6th Cir. 1987) (stating that "[i]n the interests of judicial economy, an appellate court will generally not review issues that were not addressed to the forum below").

The Partnership's next claim on appeal is that the district court had a duty to consider and determine whether the Partnership could prevail on its promissory estoppel claim (Count IV). The judge had instructed the jury that if it found for the defendants on the Partnership's contract claim, then it should deny the Partnership's promissory estoppel claim on its own initiative. In its post-trial motion, the Partnership did not ask the district court for judgment as a matter of law on the promissory estoppel claim. The Partnership now claims that the district court should have considered whether the Partnership should prevail on its promissory estoppel claim. Again, the Partnership has waived this issue on appeal by not raising it to the district court in its Rule 50(b) motion. Furthermore, the Partnership did not object to the jury instruction on Count IV, despite having the opportunity to do so in chambers and in open court, and cannot now assign error to the court's instruction on the promissory estoppel claim. Fed. R. Civ. P. 51.

The Partnership's final claim on appeal is that the district court erred by "dismissing" its fifth claim under 12 U.S.C. § 1972(1)(C) at trial. In its amended complaint, the Partnership asserted that the defendants violated Section 1972 in four ways: 1) by conditioning, "a loan . . . and loan commitment" on Shanker's placing real property in a partnership and requiring another company, Divco. Inc., to become a partner, 2) by requiring the Partnership to use Huntington Company exclusively in the placement of the bonds and for financial advisory services. 3) by forcing Shanker to have the Partnership allow a lien on Partnership real property as collateral, and 4) by requiring the partners spouses to sign any loan.

At trial, the Partnership apparently decided to raise a fifth theory as to how the defendants violated Section 1972, as permitted by Federal Rule of Civil Procedure 15(b). The Partnership attempted to elicit testimony from their banking expert. Cariton Hill, regarding whether the "entireties clause"[5] in the December 30 letter of commitment was an "unusual

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[5]The entireties clause provided:

> 28. This Commitment Letter constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof, superseding any and all negotiations and discussions between the parties. No other documents, instruments or similar or dissimilar written on [sic] verbal matters preceding the date hereof shall or may be used to vary or alter the provisions hereof.

banking practice."[6] The Joint Appendix does not contain the transcript of the court's "dismissing" this claim. See J.A. 1912-28 (partial transcript of Hill's testimony). The Partnership asserts that the district court excluded this evidence on the ground that, as a matter of law, an entireties clause in a contract it not an "unusual banking practice."

Thus, the Partnership is actually arguing that the district court abused its discretion in excluding this evidence. Mayhew v. Bell Steamship Co., 917 F.2d 961, 962 (6th Cir. 1990) (stating that a district court's decision to exclude expert testimony is reviewed for abuse of discretion). The Partnership's argument that the inclusion of an entireties clause in the Letter of Credit is an "unusual banking practice" resulting in a benefit to the Bank of about $6 million is premised on their belief that an oral contract already existed between the Bank and the Partnership to issue the Letter of Credit. The Partnership argues that, because the oral contract existed as of early November 1988, the Bank's attempt to get the Partnership to sign a written contract with this entireties clause amounted to a *release* of the Partnership's rights to sue on the oral contract. Because we agree with the district court that an enforceable parol contract did not exist, the basis

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[6]To make out a prima facie case of an act violating Section 1972(1)(C), a plaintiff must prove:

1) an anticompetitive tying arrangement;
2) that the banking practice at issue was unusual in the banking industry;
3) and the practice must benefit the bank.

Sanders v. First National Bank & Trust, Co., 936 F.2d 273. 278 (6th Cir. 1991) (citation omitted).

for the Partnership's assignment of error no longer exists and this issue is now moot.

Based on the foregoing, this Court concludes that the district court did not err in granting judgment as a matter of law to the defendants and we therefore AFFIRM the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Human Services Plaza Partnership; et al., Plaintiffs,	)	Case No.1:90CV0811
vs.	)	
Huntington National Bank; et al., Defendants.	)	

MEMORANDUM AND ORDER

Thomas, Senior Judge

Defendants Huntington National Bank ("HNB") and Huntington Mortgage Company ("HMC"), pursuant to Civil Rule 50(b), renew their motions for judgments in their favor as a matter of law. These motions relate to plaintiff's claim for breach of contract (Count II).

I.

A.

Following a four-week trial, on May 21, 1993 the Jury returned a verdict for the plaintiff Human Services Plaza Partnership ("HSPP") on Count II and assessed its damages against HNB and HMC at $6,154,903.00. On Count IV the Jury found for defendants HNB and HMC and assessed no damages. On Count V the Jury found for defendant, The Huntington Company, and assessed no damages. Finally, on Count VII the Jury found for defendant HNB and assessed no damages.

Responding to five interrogatories, the Jury answered "Yes" to Interrogatory No. 1 which asked:

> Do you find that any defendant acted wrongfully in November or December, 1988 in a matter that directly and proximately caused the Partnership to lose its project in August, 1989?

The Jury wrote in "Huntington National Bank" and "Huntington Mortgage Company" as to the question "[W]hich defendant or defendants acted wrongfully?" The Jury answered "Yes" to Interrogatory No. 2 which asked:

> Do you find that any defendant acted wrongfully in a manner that directly and proximately caused the Partnership to lose any profits to date?

In No. 2(b), the Jury set $3,077,451.50 as the "past profits, if any,...the Huntington Mortgage Company wrongfully cause[d] the Partnership to lose"; and in No. 2(c), the Jury fixed the same amount as the "past profits, if any...the Huntington National Bank wrongfully cause[d] the Partnership to lose." In No. 2(a), the Jury fixed "$O" as "past profits, if any,...The Huntington Company wrongfully cause[d] the Partnership to lose."

In Interrogatory No. 3 the Jury answered "No" to the question:

> Do you find with reasonable certainty that any defendant acted wrongfully in a manner that directly and proximately caused the Partnership to lose any future profits which the Partnership would have earned hereafter?

Consistent with the Jury verdict for HNB on Count VII the Jury answered "No" to Interrogatory No. 4:

> Do you find that the Huntington National Bank required the Partnership to hire The Huntington Company in order to obtain a letter of credit from The Huntington National Bank?

Consistent with its verdict for The Huntington Company on Count V, the Jury answered "No" to Interrogatory No. 5:

> Do you find that Thomas Whitman acted

negligently at The Huntington National Bank's Senior Loan Committee meeting of December 19, 1988?

I.

B.

In 1985, Anthony R. Caruso joined Huntington Mortgage Company as a vice president and loan officer. He was provided an office, a private secretary and a sign that stated that he was a vice president of that company. On June 29, 1988, a Huntington National Bank Letter of Commitment for a $825,000 loan was written and signed by Huntington National Bank, Anthony R. Caruso, Vice President.[1] Earlier on June 24, 1988, Mr. Caruso, identified as "Relationship Banker" and "Account Officer," submitted a "Commercial Loan Facility Request" for this $825,000 loan to HNB's Northern Region Loan Committee. The loan committee approved the request.

As stated in the request, the purpose of the [$825,000] loan was:

> To provide funds for site assembly and business relocation in order to construct a new office

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[1] As will be seen, Mr. Caruso signed at least one other communication to the partners as Vice President of Huntington Mortgage Company.

> building for Cuyahoga County Welfare Department under net lease.
>
> Pl.['s] Ex. 6.

Previously on June 6, 1988 the Cuyahoga County Commissioners accepted the proposal of Mid America Managament Corporation (on behalf of Howard Shanker and David Owen),

> for the construction of a building to be leased by the County for use by the Department of Human Services and the Cuyahoga Support Enforcement Agency.
>
> Pl.['s] Ex. 43.

On July 8, 1988, Huntington National Bank signed a letter of commitment, accepted by Howard Shanker and David D. Owen, that loaned them $825,000. The letter states that the borrower was Howard H. Shanker, individually, and David D. Owen, individually, "or a partnership to be formed." The letter caption reads:

> Re: Loan for Site Assembly and Business Relocation in Preparation of Construction of Office Building Located in Cuyahoga County, Ohio.
>
> Def.['s] Ex. D-45

The letter of commitment, under the heading "Security" provided:

> A first mortgage lien upon the real estate generally known as 1520 East 17th Street, Cleveland, Ohio (the "Sohio Site") and a third mortgage lien upon the real estate generally known as 1640 Superior Avenue, Cleveland, Ohio (the "1640 Site").

The "1640 Site" [owned by Howard Shanker] adjoined the "Sohio Site" on its west and south property lines. On the "Sohio Site," a filling station was being operated. Together the two parcels formed a rectangle with the long side fronting on East 17th Street and running to Payne Avenue.

Once the Partnership purchased the "Sohio Site," razed the filling station, and obtained necessary financing, the Partnership planned to construct a building on the combined two parcels to be occupied by the Cuyahoga County Human Services Department and the Cuyahoga Support Enforcement Agency. Four hundred and twenty-five thousand dollars ($425,000) of the proceeds of the July 8, 1988 loan of $825,000 were used by the Partnership to purchase "the Sohio Site."

The Huntington National Bank in its June 29th, $825,000 letter of credit conditioned its obligation to make the loan upon several "preclosing requirements" including:

5.c. Borrower shall, on or before October 1, 1988 enter into a lease, in form and content acceptable to Huntington, with Cuyahoga County, Ohio for use by the Department of Human Services and the Cuyahoga Support Enforcement Agency to occupy the contemplated building to be constructed on the Sohio and 1640 sites.

Def.['s] Ex. D-45 at 4.

Events strung out and it was December 19, 1988 when the Board of County Commissioners of Cuyahoga County, by Resolution, approved the Board's lease with Human Services Partnership for:

> [R]ental of a 254,000 square foot building to be built at E. 17th & Superior for the Department of Human Services and the Cuyahoga Support Enforcement Agency, in the amount of $14,713,500.00, be and the same is, hereby approved.

Pl.['s] Ex. 336.

The lease was for 5 years with right of renewal. The County was to take possession of the building upon completion of its construction.

On August 25, 1988 Howard Shanker and David Owen entered into a partnership, Human Services Plaza Partnership. Howard Shanker had a sixty-nine percent share of ownership and David Owen, through his wholly-owned Divco, Inc., had a thirty percent ownership share. The remaining one percent was in trust for Shanker's children.

On November 23, 1988 the Partnership and The Huntington Company executed a letter agreement [dated November 8, 1988] by which HSPP, by Howard Shanker and David Owen, engaged The Huntington Company to assist them as "exclusive Financial Advisor and Agent in the structuring, negotiation and private placement of [Multi-Option First Mortgage Notes due January 1, 2012]." Pl.['s] Rx. 273.

In the following cross-examination of Howard Shanker relating to what was agreed to on November 23rd, he testified as to the promises he says were made by Anthony Caruso, Vice President of Huntington Mortgage and Tom Whitman of the Corporate Finance Department of the Huntington Company. It is on these promises that HSPP bases its Count II breach of contract claim.

First, Mr. Caruso's promises:

Q . . . [H]ow long [did he say] he would provide this letter of credit for . . . ?

A. For 78 months; that would be the

construction period plus the first term of the lease.

* * * *

Q. All right. So he promised to provide a letter of credit that would last 78 months in the amount of 23 and a half million dollars plus 45 days' interest?

A. Yes.

Q. Are we together so far?

A. Yes.

Q. All right. And did he promise how much it would cost, what is the charge for the letter of credit? Did he tell you that?

A. Yes. One percent.

May 13, 1993
Cross-Examination of Shanker
Tr. at 15-16.

Then as to Mr. Whitman he conversed by teleconference. Mr. Shanker, present with Mr. Caruso and Mr. Owen, testified:

Q. ...Did Mr. Whitman make any promises to you to provide any financing assistance before November the 23rd?

A. No.

Q. All right. Are Mr. Whitman's promises, whatever they are, contained in his letter of November 8th, 1988 as modified by you and by Mr. Caruso acting for Mr. Whitman on November 23rd?

* * * *

A. Not entirely.

Q. All right.

A. That exhibit came with the attachments of the cover sheet, the terms and exhibit -- I Mean and Exhibit A and B.

Q. So --

A. I would never have signed that letter without the cover sheet, the terms and the exhibits.

* * * *

Q. Whatever order the pages were in, it was the pages that came together with the November 8th letter, that group together --

A. Yes.

Q. --with the additional change of the number on November the 23rd?

A. Yes.

Q. And is that what he promised?

A. Yes.

* * * *

Q. All right. Tell us what Mr. Whitman orally promised. Was this on November 23rd?

A. He modified it to be the MORAN because the condition -- some of the terms in the letter refer to the termination.

* * * *

A. Well, we all agreed to the 23 and a half million.

* * * *

Q. And one was a change from a MORAN...from a terminator to a MORAN?

A. That's right.

* * * *

Q. Did he make any other promises beyond that in the meeting of November 23rd?

A. Not that I recall.[2]

---

[2] Q. By the way, the November 23rd promise, was that in the place of the earlier one, whatever it takes, or was that in addition to whatever it takes?

A. I think that was finally whatever it takes; that was what he was referring to initially.

Q. So when he [Caruso] made the promise on November 23, 1988, that eliminated the previous promise of whatever it takes, fair statement?

A. Right, that was the fruition.

May 13, 1993
Cross-Examination of Shanker
Tr. at 25-27.

The November 8, 1988 letter from Thomas L. Whitman to partners Shanker and Owen attaches as Exhibit B "A Preliminary Summary of Proposed General Terms." This is one of the papers referred to by Howard Shanker when he testified that he would never have signed that letter [on November 23 1988] without the cover sheet, the terms and the exhibits." The November 8, 1988 letter explains:

> Corporate Finance intends to contact select qualified investors to determine their respective level of interest in the Notes. The final terms and conditions of the Notes may vary from this preliminary summary, subject to negotiation and acceptance by you and all other parties to the transaction.

Attached Exhibit B's Cover Sheet is headed "Human Services Plaza $22,000,000 Multi-Option First Mortgage Notes." In the middle it reads, "To Be Secured By An Irrevocable

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May 13, 1993
Cross-Examination of Shanker
Tr. at 20.

Terminating Letter of Credit Issued by The Huntington National Bank." At the bottom there appears "The Huntington Mortgage Company," "The Huntington Company" and "November 8, 1988." As part of its language the ensuing "Introduction" provides:

> The Huntington National Bank, subject to final approval and acceptance of all legal documentation, will issue an irrevocable direct pay Letter of Credit in an amount sufficient to cover outstanding principal plus 45 days accrued interest on the Notes. The Letter of Credit will expire January, 1996 unless terminated earlier as outlined below or due to a default by the partnership. [However, the following "Preliminary Summary of General Terms and Conditions" states that the Letter of Credit will "expire on January 15, 1994."]
>
> Pl.['s] Ex. 273 (B)

On November 16, 1988 on stationery of The Huntington Company, Thomas L. Whitman, "Manager, Private Placements, Corporate Finance" wrote to David Owen [The letter is Plaintiff's Exhibit 274]:

> Pursuant to our conversation, please find enclosed preliminary information related to a proposed $22,000,000 first mortgage bond financing for The Human Services Plaza Partnership project.

While the final paragraph of the letter indicates the letter and enclosures were sent to businesses which may have an "interest in this financing," the letter and enclosure was sent to David Owen "pursuant to our conversation."

The Cover Sheet of the November 16, 1988 enclosed "preliminary information [Plaintiff's Exhibit 276]" reads the same as the previously-described Cover Sheet of Exhibit B attached to the November 8, 1988 letter.

The enclosed "preliminary information" is identical in form and substantially the same in its printed content as the "Introduction" of Exhibit B attached to the November 8, 1988 letter to Shanker and Owen. The printed text of the "Introduction" of Exhibit 276 specified that the "Letter of Credit" will expire "January, 1994" and the description of the "Letter of Credit" in the Preliminary Summary of General Term and Conditions" specifically fixes the expiration date of the "Letter of Credit" as January 15, 1994.

In the sixth paragraph of the "Introduction," the amount of "$23,500,000" has been interlined for the printed amount of "$22,000,000."

Given "January 15, 1994" as the expiration date of the "Letter of Credit," it is evident that the duration of such Letter of Credit would be, substantially five years. However, as seen, Mr.

Shanker testified that Mr. Caruso promised "to provide a letter of credit that would last 78 months in the amount of 23 and a half million dollars plus 45 days interest." It becomes apparent that the "78 months" (six years and six months) duration of the letter of credit which Mr. Shanker says was promised by Mr. Caruso represents an oral modification of the five-year duration specified in the November 8, 1988 attached Exhibit B (Plaintiff's Exhibit 273), and also specified in the "preliminary information" enclosed in the November 16, 1988 letter of Whitman to Owen (Plaintiff's Exhibit 276).

In sum, to construct the contract on which the Partnership bases its Count II Breach of Contract claim, the Jury must have assembled and accepted the content of Mr. Shanker's testimony, *supra* at pages 7-9. The content of that testimony amends and enlarges the terms of the letter agreement of November 23, 1988 (the November 8, 1988 Whitman letter, revised in amount to $23,500,000 from $22,000,000). The oral promises of Caruso and Whitman, testified to by Shanker, revised the duration and terms of the Huntington National Bank Letter of Credit described in the attachments to the November 8, 1988 Whitman letter and in the enclosure in the November 16, 1988 Whitman letter.

On December 30, 1988 Huntington National submitted to the Partnership a commitment letter to issue a letter of credit in the Amount of $23,500,000 with the condition that the Bank was limiting its participation to $8,000,000 (Plaintiff's Exhibit 17). The Partnership refused to sign the commitment letter, insisting that Mr. Caruso had committed the Huntington National Bank to

issue the full $23,500,000 letter of credit without participation limitation. After the Bank issued a short extension of the commitment letter, the commitment letter expired by its terms on January 20, 1989 when the Partnership did not accept the Bank's limited $23,500,000 letter of credit, with the Bank's participation capped at $8,000,000.

II.

A.

In its jury instructions, this court thus framed the issue of apparent authority in the Jury's consideration of Count II, breach of contract:

> As to Count II, HSPP alleges:
>
> 1) that on or about November 23, 1988 HNB and HMC through their loan officer and agent, Anthony Caruso, promised to provide HSPP with a $23,500,000 letter of credit to guarantee 78 month MORANS to be placed and sold by HC, the proceeds of which notes would finance the HSPP building project.
>
> 2) that the letter of credit was to be for the

full $23,500,000 without participation and a 1% fee was to be paid to HNB.

3) that HSPP accepted this offer and a contract was formed;

4) that HNB and HMC breached this contract by failing to provide the full letter of credit without the requirement of participation; and

5) that HSPP suffered monetary damage because of the breach of contract.

HNB and HMC deny that there was any oral promise or contract to provide HSPP with such a letter of credit with or without participation. Moreover, HNB and HMC say that even if Caruso did make such a promise, Caruso did not have the authority to make this promise on behalf of HNB or HMC.

Jury Charge at 16-17.

For HSPP to prevail on Count II the Jury was further instructed as to Count II, in part, that HSPP had to prove the following elements:

First, you must determine from the testimony and admitted documents whether

HSPP has proved by a preponderance of the evidence that Caruso promised, on or about November 23, 1988, to provide HSPP with a full $23,500,000 letter of credit without any requirement of participation in exchange for a 1% fee.

The second element in Count II which HSPP must prove is that Caruso had the authority to enter into a contract on behalf of HNB and HMC to provide a $23,500,000 letter of credit.

The Jury was then told:

There are two main types of agent authority, express and apparent. Acts of the agent committed under either of these two types of authority are binding upon the principal.

Express authority is that authority expressly given by the principal to its agent. In the case of express authority, the principal clearly sets forth the exact scope -- the exact terms and limits -- of the agent's authority.

Conversely, apparent authority to outside the scope of the agent's express authority. It is the authority that the principal holds its agent out

> as possessing, or that the principal knowingly allows its agent to act as possessing even if the agent does not possess express authority. Apparent authority can only be created by the acts of the principal; the agent cannot create his or her own apparent authority.
>
> In order for a promise made within the scope of an agent's apparent authority to be binding upon the principal, the opposite party must: 1) believe that the agent has the authority to make the promise; 2) exercise reasonable care in forming that belief; and 3) rely upon that belief to its damage.

HSPP's claim of Caruso's apparent authority was then summarized to the Jury:

> The evidence shows that Caruso did not have the express authority to enter into a contract on behalf of HNB and HMC to provide a $23,500,000 letter of credit. However, HSPP asserts and relies on Caruso's apparent authority.
>
> If you find that Caruso did have the apparent authority to enter into a contract on behalf of HNB and HMC to provide a $23,500,000 letter of credit, then you must proceed to consider three remaining elements of

a valid contract which HSPP must prove.

> Of course, if there was no apparent authority for Caruso to enter into a contract on behalf of HNB and HMC to provide a $23,500,000 letter of credit, then there can be no contract.
>
> Jury Charge at 19-22.

II.

B.

As the legal standard for a Judgment as a matter of law under Civil Rule 50(b), the defendants rely on language from Monette v. AM-7-7 Baking Co. Ltd., 929 P.2d 276, 280. Monette states:

> [1,2] On a motion for a judgment notwithstanding the verdict or for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. O'Neill v. Kiledjian, 511 P.2d 511, 513 (6th Cir. 1975). As applied in this context, "sufficient evidence" will be found unless, when viewed in the light of those inferences most favorable to the non-movant, there is either a complete absence

> of proof on the issues or no controverted issues of fact upon which reasonable persons could differ. Sawchik v. E.I. DuPont DeNemours & Co., 783 F.2d 635, 636 (6th Cir. 1986).

Plaintiff expresses no disagreement with the Monette legal standard by which this court must rule in considering defendants' Rule 50(b) Motion for Judgment Notwithstanding the Verdict.

Defendants assert that "no legally sufficient evidence demonstrates that HNB caused the partnership to believe Caruso had authority to approve a $23,500,000 letter of credit." Defendants amplify:

> To establish that HNB promised to provide the partnership with a $23,500,000 letter of credit, there must be sufficient evidence to show that Caruso had apparent authority to make that promise on HNB'S behalf. The partnership failed to meet that evidentiary burden.
>
> > "Apparent authority" has been defined as "...the power to affect the legal relations of another person by transactions with third persons...arising from...the other's manifestations to such third persons."

Master Consolidated Corp. v. BancOhio Nat'l Bank, 61 Ohio St.3d 570, 576 (1991) (Tab A), quoting, Restatement (Second) of Agency, §8 (1958) (Tab A). For a principal to be bound by the acts of an agent under this theory, the evidence must affirmatively demonstrate:

> (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority and
>
> (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority (emphasis added).

Master Consolidated, 61 Ohio St.3d at syllabus (Tab A).

Def.['s] Mot. at 5-6.

Referencing the same state law authority, plaintiff HSPP paraphrases the first test of Master Consolidated:

> The first test of whether apparent authority exists under Master Consolidated Corp. v. BancOhio National Bank, 61 Ohio St.3d 534, 575 N.E.2d 817 (1991), adopted from the Restatement of Agency, is whether the principal, which in this case was Huntington Mortgage Company and Huntington National Bank, presented Caruso to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority.
>
> Pl.['s] Opp'n Br. at 4.

The full syllabus of Master Consolidated (first and second requirements) reads:

> In order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. (Logsdon v. ABCO Const. Co. [1956], 103 Ohio App. 233, 241-242,

3 O.O.2d 289, 293, 141 N.E.2d 216, 223, approved.)

Defendants do not challenge the correctness of this court's direction that the Jury had to find that Caruso did have "the apparent authority to enter into a contract on behalf of HNB and HMC to provide a $23,500,000 letter of credit." Rather, in pressing their Rule 50(b) motion, they urge that "no legally sufficient evidence demonstrates that HNB caused the partnership to believe Caruso had authority to approve a $23,500,000 letter of credit." Plaintiff HSPP insists there is legally sufficient evidence to demonstrate Caruso's apparent authority to approve a $23,500,000 letter of credit. The evidence relevant to plaintiff's claim of apparent authority is now reviewed.

III.

A.

Plaintiff HSPP argues:

> Throughout late 1987 and early 1988, defendants advertised to the public that customers with special needs should deal with Huntington's "Relationship Bakers" because these bankers possessed special expertise and authority to meet the needs of a particular customer. Shanker testified that he saw these advertisements and was drawn to Huntington

because of them.

Pl.['s] Opp'n Br. at 4-5.

Mr. Shanker testified on cross-examination, as on direct examination, that he had read ads in Crain's Cleveland Business. As to information found in "those advertisements or in the brochure" [Plaintiff's Exhibit 95] [he] received from Mr. Caruso he "thought it was significant." The Brochure "The Huntington: A Banking Philosophy," in pertinent part, states:

> Our strength is making sure you have the banking products and services best suited to help your business meet your objectives. This is why The Huntington provides you with your own Relationship Banker who understands the full range of corporate banking products and can structure the products to best meet your needs. This person provides continuity in your banking relationship and seeks an in-depth understanding of your business. And, through the years, your Relationship Banker will strive to understand your business as completely as possible

Asked why this Brochure was important to him Mr. Shanker testified:

> Well, it represented that they were experts in real estate, in real estate, and they provided a

relationship banker who provided a continuity through the entire transaction to insure that it was handled properly.

May 11, 1993
Direct Examination of Shanker
Tr. at 20.

Applying the term "Relationship Banker" to Mr. Caruso[3] he understood that Mr. Caruso was to provide for him "[a]ll the banking services." Mr. Buxton, who supervised Mr. Caruso, had told Mr. Shanker "that Mr. Caruso was qualified to handle this transaction for [him]." Despite Mr. Shanker's belief that Mr. Caruso, as his Relationship Banker, could provide him "all banking services," the $825,000 loan transaction demonstrated that Mr. Caruso's authority did not include the right to approve substantial bank loans. While Mr. Caruso approved the loan to David D. Owen and Howard H. Shanker on June 24, 1988, his approval was not enough. The loan was not provided them until the Huntington Northern Region Loan Committee later approved the loan, as the Commercial Loan Facility Request for that loan (Plaintiff's Exhibit 6) establishes.

HNB argues:

---

[3] The Commercial Loan Facility Request for the $825,000 Loan (Plaintiff's Exhibit 6) and the Commercial Loan Facility Request for the $23,500,000 loan (Plaintiff's Exhibit 10), in the "Relationship Banker" Block, named "Anthony R. Caruso."

> The evidence shows that HNB authorized Caruso to sign the $825,500 commitment letter only after on HNB loan committee had approved it.
>
> Def.['s] Mot. at 8.

This is one inference that may be drawn from the evidence. There is another inference which Plaintiff seeks to draw. Plaintiff would infer that Mr. Caruso had authority to commit HNB to the $23,500,000 letter of commitment because Mr. Caruso's letter to Howard H. Shanker of June 29, 1988 is on the stationery of The Huntington National Bank, and Mr. Caruso signed as Vice President of The Huntington National Bank. This letter informed Mr. Shanker:

> The Huntington National Bank (hereinafter "Huntington") is pleased to advise you that it is prepared to provide a mortgage loan for site assembly and business relocation in connection with the above-captioned project subject to the following terms and conditions.
>
> Def.['s] Ex. D-45.

Mr. Caruso's signature as Vice President of The Huntington National Bank on June 29, 1988 must be considered with other communications. On June 21, 1988, eight days earlier Mr. Caruso wrote to Mr. David D. Owen and Mr. Howard Shanker Re: Human Services Plaza Associates (Plaintiff's Exhibit

222). The letter related to "various discussions concerning the financing of the proposed building." The letter was on the stationery of The Huntington Mortgage Company and Mr. Caruso signed the letter as Vice President. This June 21, 1988 letter of Mr. Caruso in which he identified himself as Huntington Mortgage Company Vice President negates any possible holding out by Mr. Caruso's self identification as Huntington National Bank Vice President one week later.

Tom Whitman, on November 28, 1988, wrote to Transaction Participants "Re: 23,500,000 Human Services Plaza ____% Multi-Option Adjustable Rate Notes due January 1,2004" (Plaintiff's Exhibit 269). In listing the "Transaction Team" he identified himself as "Corporate Finance Department The Huntington National Bank." He listed "Mr. Anthony Caruso, The Huntington Mortgage Company." Named first as members of the "Transaction Team," Mr Howard Shanker and Mr. David D. Owen received this Whitman letter. Two days later on November 30, 1988, on DIVCO, INC. stationery, David Owen wrote Mr. Anthony R. Caruso, Vice President, The Huntington Mortgage Company (Plaintiff's Exhibit 207). He wrote to advise that "demolition of the now empty service station building, formerly occupied as a Sohio Service Station, will begin tomorrow." The two November 1988 letters identifying Mr. Caruso as Huntington Mortgage Company Vice President, coupled with his own letter of June 21, 1983, neutralize any possible inference by Mr. Caruso's June 29, 1988 letter that Huntington National Bank regarded Mr. Caruso as one of its Vice Presidents. These four communications, read together, offer no

evidence from which a Reasonable Jury might find that Mr. Caruso had authority to commit Huntington National Bank to the $23,500,000 letter of credit.

In eight numbered paragraphs, pages 4-8 of HSPP's opposition brief, "[p]laintiff presented evidence of the defendants holding Caruso out as having sufficient authority." To render each of these summarizing paragraphs relevant to the "holding out" keystone of "apparent authority," it is essential that the summarized evidence show that Hunting National Bank "held out" Anthony Caruso as having "authority" to commit Huntington National Bank to the $23,500,000 letter of credit. Anthony Caruso freely admitted that he did not have that authority. While some of the numbered paragraphs refer to evidence that indicates that he was held out as having authority to perform "banking services," none of that evidence is legally sufficient to permit a reasonable jury to find that he had the authority to orally bind Hunting National Bank to issue an unrestricted letter of credit of substantial amount.

III.

B.

Attention is shifted to examining the evidence that bears on the second requirement of Master Consolidated, *supra* at 16.

(2) that the person dealing with the agent knew of those facts [the holding out called for in requirement (1)] and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority (emphasis added).

By finding in favor of HSPP on Count II (breach of contract), the Jury must have concluded that Caruso made the promise which Mr. Shanker attributes to him, that Huntington National Bank would issue a $23,500,000 letter of credit and that this promise was binding on Huntington National Bank. Whether such conclusion of the Jury can be reconciled with the testimony of Mr. Shanker, Mr. Owen and Mr. Caruso, must be explored.

Mr. Caruso's testified that he told the partners that their transaction with Huntington required loan committee approval. On cross-examination by Huntington counsel, Mr. Caruso testified:

Q. Did customers with whom you dealt routinely know about the limits on your authority?

A. I don't think so.

Q. If customers asked you, would you tell them that you had

limited authority?

A. Yes.

Q. Did you seek to mislead any customers about the limits on your authority?

A. No.

Q. If customers asked, did you specifically tell them when transactions required committee approval?

A. Yes.

Q. As a matter of fact you told both Mr. Shanker and Mr. Owen that these transactions with which you were dealing did require committee approval, didn't you?

A. Yes.

Q. And you told them that more than once?

A. I think so.

Q. You told them that in connection with the $825,000 loan, do you remember that?

A. Yes.

Q. And you told them with regard to the 23 and a half million dollar letter of credit, didn't you?

A. Yes.

Q. And you never told them that there had been committee approval for that transaction, did you?

A. No.

April 26, 1993
Cross-Examination
of Caruso.

In his testimony, Mr. Shanker did not deny that Mr. Caruso had so informed him. This failure to deny that Mr. Caruso so informed him, permits an inference that it happened. Yet an inference is not enough to hold that what Mr. Caruso said is true

as a matter of law.

Similarly, David Owen, a former banker, did not deny, in his direct testimony, that Mr. Caruso had told him that committee approval of a substantial bank loan was required. But in his case, on cross-examination, Mr. Owen acknowledged the need for bank loan committee approval of a substantial loan.

Q. What's a loan committee?

A. It's a committee, so far as I know, that reviewed loans that had been negotiated by loan officers.

Q. For what purpose; for curiosity?

A. I don't think I ever ascribed any particular purpose to it.

Q. Mr. Owen, you knew full well that substantial loans are reviewed by a loan committee for their approval, didn't you?

A. Or their ratification.

Q. Whatever you want to call it, there was no transaction until

they approved it or ratified it; true?

A. I guess.

Q. All right. Was it your impression that financial institutions make $20 million loans casually in conversation?

A. No.

Q. Without writings?

A. No -- well, wait. That's two questions.

Q. All right. Let's try it first. Casually?

A. No.

Q. Any $20 million loans casually?

A. No.

Q. Was it your impression that financial institutions ordinarily make $20 million loans without

writings?

A. I would say no.

Q. And indeed those writings will dot every I and cross every T several times, won't they?

A. I would think.

April 26, 1993,
Cross-Examination of Owen,
Tr. at 28-29.

David Owen knew that substantial bank loans when made by a loan officer, needed to be in writing and still needed to be approved by a bank loan committee. He knew these facts when "Howard B. Shanker, individually, and David D. Owen, individually, or a partnership to be formed, were informed in writing (letter of June 29, 1988) that Huntington National Bank is prepared to provide a mortgage loan" of $825,000. He knew it later in 1988, after HSPP, a partnership, was formed (of which he and Howard Shanker were partners), and after Anthony Caruso, loan officer and Vice President of Huntington Mortgage Company, may have made the oral commitment that Huntington National Bank would issue a $23,500,000 letter of credit. Pursuant to R.C. 1775.11, his knowledge of the need for bank loan committee approval of such oral commitment was "[n]otice to any partner of any matter relating to partnership affairs...

acquired while a partner or then present to his mind." Therefore, that fact, known to partner Owen "operate[s] as notice to or knowledge of the partnerships."

Thus, Owen's admissions as partner of HSPP bind the partnership. This knowledge of the partnership of the need for bank loan committee approval of any oral commitment by a loan officer denies as a matter of law the right of HSPP to claim that in "good faith [the second test of Master Consolidated, *supra*, at 16] HSPP had reason to believe and did believe" that Mr. Caruso's promise that Huntington National Bank would issue an unrestricted $23,500,000 letter of credit would or could bind Huntington National Bank.

As a separate piece of evidence the court takes up the "done deal" testimony which Mr. Shanker attributed to Mr. Caruso.

> Q. Now, you have told, us that Mr. Caruso made some statements about its a done deal at some time, do you remember that?
>
> A. Yes. Yes.
>
> Q. Was that during the period of the first promise, that is before November 23rd, or was it at the November 23rd meeting or after

the November 23rd meeting?

A. It was after November 23rd. I believe when he called me he was referring to the information he had regarding the sale of the bonds. The bonds were sold.

* * * *

Q. So that would be after November 23rd?

A. I think it was early December.

May 13, 1993,
Cross-Examination of Shanker
Tr. at 20-21.

Notwithstanding Mr. Caruso's statement to Mr. Shanker about a "done deal." Mr. Shanker recognized, on cross-examination, that written approval of any oral commitment was needed.

Q. So you understood that the procedure you would have to follow to have a binding commitment would eventually

be to sign a paper and pay a fee?

A. After I received the oral commitment he told me it would be reduced to a writing and I would pay a fee, and I agreed to do that [as to July 8, 1988 signed letter commitment].

Q. Oh, so you understood, when there was this oral promise, that it would eventually have to be reduced to writing, signed and pay a fee?

A. Yes.

May 13, 1993
Cross-Examination of Shanker
Tr. at 104.

Prospectively Shanker had no reason to believe it would occur any differently.

Q. And did you understand that would be the nature of the transaction that would occur later as well?

A. Not necessarily.

Q. Did you have any reason to believe it wouldn't be occurring in the same way for any later transaction?

A. No. No, I didn't.

Id.

In his testimony concerning his and Mr. Owen's meeting with Roger Buxton on December 16, 1988, Mr. Shanker does not say that he told Mr. Buxton that Mr. Caruso had said the $23,500,000 letter of credit was a "done deal." Nor does Mr. Owen say "done deal" was mentioned. However, after his deposition testimony was reviewed, Mr. Owen was further cross-examined.

Q. Does that refresh your recollection?

A. I would take your word for it, that's what I said.

Q. Okay. And is that the truth?

A. That's my recollection.

Q. So your recollection is that you don't recall either you or Mr. Shanker making any statement about Mr. Caruso has already made this transaction, it's a done deal?

A. I don't recall having said that.

Q. Or hearing Mr. Shanker say that?

A. No.

April 26, 1993,
Cross-Examination of Owen

Tr. at 199.

In view of the foregoing admissions that any oral promise had to be reduced to writing, as a matter of law, Mr. Shanker could not in "good faith" have had "reason to believe or could he 'believe' that Mr. Caruso had the authority to bind Huntington National Bank to a 'done deal'."

As a third and separate piece of evidence the December 16, 1988 meeting testimony of Buxton, Shanker and Owen will now be reviewed. It also bears on Mr. Shanker's claim that Mr. Caruso had made a "promise" binding on Huntington National

Bank to issue a $23,500,000 letter of credit to HSPP.

Cross-examined about the December 16th meeting based on his deposition testimony, which he ultimately admitted was true, two facts emerge: first, Mr. Shanker believed he, "already had a commitment from the bank, and second, he knew that Mr. Buxton was taking the $23,500,000 letter of credit transaction to the senior loan committee.

Q. Starting at line 16, "Question: All right. Did you consider that he, "referring to Mr. Buxton, "denied the promise when he met with you and said I am going to take this to a loan committee? Did you consider that denied the previous promise?

"Answer: At that particular moment in time I was aware that there may have been a problem because his story was totally different than Mr. Caruso and Mr. Whitman."

"Question: Did you consider that he was denying his previous promise when he said he was

going to take the matter to a loan committee?"

"Answer: Again, I thought there was a problem. It seemed that he forgot what Mr. Whitman and Mr. Caruso and I had just signed and he had congratulated us on."

Do you now recall -- first, do you remember those answers to those questions?

A. Yes.

Q. Do you now recall that Mr. Buxton told you he was going to take the transaction to a loan committee?

MR. KAHN: Objection

THE COURT: Overruled.

A. I believe he said that we had to agree that the - someone in Columbus approved the loan with a change in it, that we had

to agree to a change.

Q. You did understand he was going to the loan committee for some purpose?

A. He said at some time "senior members" or "loan committee," yes.

Q. Do you remember these questions and answers? And I am now at page 432.

"Did you consider that Mr. Buxton reneged on his promise when he said he was going to take the matter to a loan committee?"

"Answer: Yes."

"Question: Did you then say I'm not going to go forward any further?"

"Answer: No."

"Question: Did you agree that

he could take the matter to a loan committee?"

"Answer: I had no control over Mr. Buxton. I already had a commitment from the bank."

"Question: Excuse me, did you say, You may not take the matter to the loan committee; I have a commitment and I'm leaving if you don't rely upon that commitment?"

"Answer: I already had a commitment from the bank."

"Question: Did you say you would not permit him to take it to a loan committee?"

"Answer: No, I did not say that."

"Question: Why not?"

"Answer: Because at that particular point in time Mr. -- it was clear to me that there was a

problem and we were going -- we were trying to do anything, because of our grave financial condition, to resolve the matter.

"Question: So was it agreeable with you that he had to take it to a loan committee?"

"Answer: If that's what he felt he had to do to resolve the matter to get the loan straightened out."

"Question: Did you understand if he took it to a loan committee the loan committee might disapprove it?"

"Answer: [H]e never told me that."

"Question: Did you understand?"

"Answer: He told me they wanted to have a construction manager over Mr. Owen because they did not think he was

qualified, after the bank had told me to give him 30 percent of my assets, and they told me, that they didn't like Turner Construction Company now."

"Question: Did you understand that if something was being taken to a loan committee, the loan committee might disapprove it?"

"Answer: The loan committee might have disapproved it, sure."

Q. Did you give those answers to those questions?

A. Yes.

Q. Were they true?

A. Yes.

May 13, 1993,
Cross-Examination of Shanker
Tr. at 95-98.

Mr. Owen, the partner of Mr. Shanker, in words or

substance, testified the same as Mr. Shanker.

Q. During that discussion [December 16, 1988] did Mr. Buxton explain that he was planning to present the letter of credit application to a loan committee on the following business day, which would be Monday?

A. I wouldn't characterize it in that manner.

Q. Did he say he was going to present the transaction to a loan committee?

A. It was my understanding that he was going to present the final matters to the loan -- to a loan committee.

Q. For action?

A. For final action.

Q. And possibly for approval?

A. That was my understanding, final approval.

THE COURT: And what do you say he was, going to present; what were your words?

THE WITNESS: The final -- the final terms of the transaction.

THE COURT: Okay.

April 26, 1993,
Cross-Examination of Owen
Tr. at 196-197.

Mr. Shanker's testimony indicates that he believed that prior to December 16, 1988 he "already had a commitment from the bank. But at best, this was an oral commitment which Mr. Caruso may have made.[4] As seen, Mr. Shanker testified that he

---

[4] On cross-examination, at one point, Mr. Caruso testified, "By commitment I think I meant that I had committed to him we would get the deal done." But later came this colloquy:

Q. So you never specifically said to anybody at the partnership level that you committed to this loan or that the bank had committed to this loan or that this loan had been committed to, that's true, isn't it?

A. That was my testimony.

"understood, when there was this oral promise, that it would eventually have to be reduced to writing, signed [and a fee paid]." But his testimony regarding the December 16th meeting with Mr. Buxton shows further that whatever he believed prior to December 16th, 1988, about the need for the bank's loan committee approval of any oral commitment loan officer Anthony Caruso may have given him, he admitted, in his deposition and at trial, that he learned on December 16th, that Mr. Buxton was taking the transaction to the Senior Loan Committee and "the loan committee might have disapproved it, sure."

In view of these admissions of partner Shanker and the admissions of partner Owens', it is now determined as a matter of law that plaintiff HSPP's own evidence establishes that HSPP cannot meet the "good faith" test, the second requirement of Master Consolidated, *supra*.

> (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the

---

Q. And it's true, isn't it?

A. Yes.

May 4, 1993,
Cross-Examination of Caruso
Tr. at 2, 4-5.

> necessary authority (emphasis added).

It having been determined as a matter of law that plaintiff HSPP failed to offer sufficient evidence at trial to meet both of the two "apparent authority" requirements of Master Consolidated, *supra* at 16, this court grants defendant Huntington National Bank's Motion for Judgment as a Matter of Law. Notwithstanding this dispositive ruling, this court will take up certain other issues which the defendants raise in their post-verdict motion.

IV.

A.

The defendants contend that "As a Matter of Law the Failure of the Partnership's Consideration Precludes Any Recovery for Breach of the Alleged Contract." Citing Ohio contract law, defendants rely on Hutchinson v. S.M.C. Aluminum Foundry, Inc., 1993 Ohio App. LEXIS 1093 (Wood App. 1993), and its statement of Ohio law:

> In order for a plaintiff to recover on a contract he must show that he substantially performed [*8] or tendered performance of his own promises. Thomas v. Matthews (1916), 94 Ohio St. 32, paragraph two of the syllabus. In addition, where one of the parties to a contract

> neglects or refuses to perform a material promise in a contract there is a failure of consideration. Colonial Ins. Co. v. Graw (1955), 102 Ohio App. 430, 438. Failure of consideration excuses nonperformance on the part of the other party. See, generally, 18 Ohio Jurisprudence 3d 127, Contracts, § 217.
>
> *Id.* at 7.

In determining that it would set aside a jury verdict awarding Hutchinson damages against her employer for breach of a settlement agreement, the Court of Appeals reasoned:

> A vital term of the agreement in the case at bar was that Hutchinson dismiss her lawsuit against SMC with prejudice. In return, SMC would perform certain acts, e.g., provide Hutchinson with her raise. The acts of the parties, not their promises were the consideration for the agreement, Bloomer v. Cist (1897), 7 Ohio Dec. 337, 343, and, as such, were to be performed concurrently, Knollman Lumber Co. v. Hillenbrand (1940), 64 Ohio App. 549, 553. Undisputed evidence in this case reveals that Hutchinson never dismissed her suit with prejudice.

The Court of Appeals then held:

> Under Bloomer, this failure bars her right to recovery because of a failure of consideration, Bloomer, *supra* at 343.
>
> *Id.*

Defendants assert that "[n]o one testified that the partnership promised to purchase HNB's letter of credit as consideration for HNB's promise to sell it." It cites Owens' testimony:

> Q. I didn't ask what your intent was. I asked did the partnership ever promise that it would accept any Huntington National Bank letter of credit or any other financing assistance for the construction of this project?
>
> A. I never made a statement like that to anyone from the Huntington.
>
> Q. To your knowledge did Mr. Shanker ever make any such promise?
>
> A. I -- I can't speak to that.

Q. To your knowledge?

A. To my knowledge he did not.

April 27, 1993,
Cross-Examination of Owen
Tr. at 248-249.

Without referring to any specific testimony of Howard Shanker plaintiff counters:

> It was unrefuted that Shanker, not Owen, was the primary contact between HSPP and the defendants. Shanker testified that he and Caruso reached an agreement on November 23, 1988, and that part of this agreement was necessarily that HSPP would accept the offered financing.

Pl.['s] Opp'n Br. at 13.

For reasons earlier stated, the court has found that Huntington National Bank did not hold out Anthony Caruso as having authority to bind Huntington to an unrestricted $23,500,000 letter of credit. Notwithstanding, the court agrees with the last quoted statement of plaintiff's counsel, and that HSPP accepted the offered financing. The letter agreement of November 23, 1988, with the oral modifications testified to by Mr. Shanker, had sufficient consideration through the joint

promises of the parties.

Shanker and Owen acted for HSPP; Whitman acted for The Huntington Company (Corporate Finance Department); and Caruso acted for Huntington Mortgage Company as its loan officer. Within his loan limits, Caruso could bind Huntington National Bank. By increasing to $23,500,000 the amount of the described Mortgage Notes, and by initialing the increase, Mr. Caruso acted for Mr. Whitman, but also acted to corroborate his attempted commitment of Huntington National Bank to issue the letter of credit of that amount to guarantee the payment of the mortgage notes.

HSPP correctly argues that its rejection of offers of financing from other potential lenders once the exclusive engagement letter was signed, established an additional form of consideration -- the forbearance of a right at the request of the other party. While Ohio Revised Code § 1305.04 emphasizes that no consideration is necessary to establish a credit or to enlarge or otherwise modify its terms, this court does not believe that parties agreeing to the issuance of a letter of credit as one of several promises that compose the contract would be relieved from the obligation of consideration to support the contract.

As to the consideration supplied by the letter agreement of November 23rd, as modified orally, Huntington seeks to apply Hutchinson. The defendants argue:

The partnership apparently claimed that

it promised to hire HC's placement services as consideration for HNB's alleged promise to provide the partnership with a $23,500,000 letter of credit. However, the evidence shows that on or before December 28, 1988, the partnership requested and obtained HC's consent to terminate its agreement to use HC's services. Exhibit D-108 (Tab I). When it terminated its agreement with HC, the partnership failed to perform its promise under the contract. This failure to provide the promised consideration bars the partnership from any recovery under the contract. Hutchinson v. S.C.M. [S.M.C.] Aluminum Foundry, Inc., 1993 Ohio App. LEXIS 1093, at 7 (Tab D).

Def.['s] Mot. at 17.

Plaintiff counters:

The evidence clearly showed that it was the defendants, not HSPP, who desperately wanted to be released from the exclusivity agreement signed on November 23, 1988. Defendants' own witness, Whitman testified that he released HSPP from the exclusivity arrangement on or about December 6, 1988. Plaintiff disputes the accuracy of this testimony

> with regard to the timing of the release, but does not dispute Whitman's testimony that it was his decision to release HSPP.
>
> Pl['s] Opp'n Br. at 15.

It was Thomas L. Whitman, Manager, Private Placement, Corporate Finance [The Huntington Company] who began his letter of December 28, 1988 [Plaintiff's Exhibit 28] to Howard Shanker, Human Services Plaza Partnership:

> This letter will serve as a formal notification that The Huntington Company is releasing Human Services Plaza Partnership from any and all of it's [sic] obligations to The Huntington Company under the engagement letter dated November 8, 1988. (attached).

The Huntington Company is stating, in effect, that it is acting unilaterally to terminate HSPP's exclusivity obligation to The Huntington Company. This hardly support's Huntington's assertion that it was HSPP who sought to have the engagement letter agreement terminated.

Moreover, HSPP urges:

> Even if defendants could show that HSPP terminated its agreement with The Huntington Company, there is no evidence at all

> of HSPP's alleged termination of HC prior to being informed of the results of the December 19, 1988, Senior Loan Committee meeting, at which time it became clear that defendants did not intend to honor their financing agreement. Therefore, any termination of the exclusivity agreement was justified in the face of defendants, breach of contract.
>
> Pl.['s] Opp'n Br. at 16.

Indeed, the record shows that Mr. Shanker believed that HSPP had received a binding commitment from Huntington (through Mr. Caruso) that the Bank was going to issue an unrestricted $23,500,000 letter of credit. On December 19, 1988, he learned Huntington would only commit itself to $8,000,000 of that letter of credit. After this date, and given the plaintiff's belief that such restricted participation constituted a breach of contract,, there was some basis for plaintiff requesting The Huntington Company to put in writing its release of HSPP to avoid a later "claim for fees which defendants might believe were due and owing."

Giving full consideration to the record and arguments of counsel, the court denies Huntington's contention that the letter of December 28, 1988 constituted a failure of consideration of plaintiff's alleged contract under Count II.

IV.

B.

The defendants argue that "As a Matter of Law, the Partnership's Alleged Contract Failed to Satisfy the Applicable Statute of Frauds." The defendants rely on several parts of R.C. 1335.05. The parts of the statute which are deemed here relevant are quoted:

> No action shall be brought whereby to charge the defendant . . . upon a contract or sale of lands. . . or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.
>
> O.R.C. § 1335.05

The defendants cite underlying Ohio law that has interpreted our Statute of Frauds:

> The writing "is not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself or some other writing to which it refers,

without the necessity of resorting to parol proof." Kling v. Bordner, 65 Ohio St. 86, paragraph 1 of the syllabus (1901); see also Jacobs v. Joseph E. Copp Co., 123 Ohio St. 146, 151-52 (1930); Restatement (Second) of Contracts §131 (1981); 2 Corbin, Contracts §499 (1950).

Defendants then argue:

> The partnership presumably proffered its November 8, 1988 letter agreement with HC as the writing required to satisfy the statute [ ] of frauds. Ex. D-108 (Tab F). The partnership received no other signed writing which related to this transaction. That agreement contained a "preliminary agreement, of proposed general terms and stated:
>
> > The final terms and conditions of the Notes may vary from this preliminary summary, subject to negotiation and acceptance by [the partnership] and all other parties to the transaction.
>
> Def.['s] Mot. at 20-21.

Actually, plaintiff HSPP relies on the November 8, 1988 letter as revised by interlineation, initialed and signed on

November 23rd, 1988. Otherwise, this court agrees with defendants, quoted statement. Indeed this court, *supra* at 9, notes that the letter of November 8, 1988 states:

> The final terms and conditions of the Notes may vary from this preliminary summary, subject to negotiation and acceptance by you and all other parties to the transaction.

This court further found, *supra* at 12,

> The content of that [Mr. Shanker's] testimony amends and enlarges the terms of the letter agreement of November 23, 1988 (the November 8, 1988 Whitman letter, revised in amount to $23,500,000 from $22,000,000). The oral promises of Caruso and Whitman, testified to by Shanker, revised the duration and terms of the Huntington National Bank Letter of Credit described in the attachments to the November 8, 1988 Whitman letter and in the enclosure in the November 16, 1988 Whitman letter.

Hence, the Statute of Frauds, as interpreted in Kling v. Bordner, 65 Ohio St. 86, Supreme Court of Ohio (1901), paragraph 1 of the syllabus, approved and followed in Jacobs v. Joseph E. Copp Co., 123 Ohio St. 146, Supreme Court of Ohio (1930), precludes the written agreement of November 23, 1988, as amended orally

(by parol)[5], unless there was a subsequent agreement in writing that adopted and incorporated the oral promises to which Mr. Shanker testified.

Plaintiff thus seeks to counter defendants' Statute of Frauds argument.

> Defendants' statement of the law concerning the statute of frauds in Ohio omits several important points which have a direct bearing on the analysis of this issue.
>
> It is not necessary for the writing to be contained in a single document in order to satisfy the statute of frauds. Several writings may be

---

[5] Q. So Mr. Whitman modified two things from the November 8th letter.

A. Yes.

Q. One was the amount which was changed to twenty-three-five?

A. Right. Yes.

Q. And one was a change from a..... terminator to a MORAN?

A. That's right.

May 13, 1993,
Cross-Examination of Shanker,
Tr. at 27.

> construed together for the purposes of establishing a writing to take a contract out of the statute of frauds, even though the writings may be made at different times. Thayer v. Luce, 22 Ohio St. 62 (1871). Not all of the writings need to be signed by the party to be charged, if the signed writing refers to the unsigned writing or if it appears by inspection and comparison of the writings that the unsigned writings logically relate to or form part of, the same transaction. Soteriades v. Wendy's of Fort Wayne, Inc., 34 Ohio App. 3d 222, 517 N.E.2d 1011 (Ct. App. Franklin Cty. 1986).
>
> Pl.['s] Opp'n Br. at 17.

In Soteriades the signed stock agreement and the corporate minutes together formed a memorandum that satisfied the Statute of Frauds because the signed stock agreement referred to corporate minutes which did set forth "the terms of the employment contract."

> The memorandum in writing satisfying the requirement of the Statute of Frauds may consist of several related writings, even though only one such writing is signed, if the signed writing refers to the unsigned writing or if it appears by inspection and comparison of the writings that they logically relate to or form part of the same

transaction (citations omitted).

* * * *

> [W]e conclude that the corporate minutes, together with the signed [stock] agreement, constitute a sufficient memorandum in writing to meet the requirement of the Statute of Frauds.

Soteriades at 225, 226.

If Soteriades as a precedent is limited to its facts, it offers the plaintiff no support. To take the employment agreement outside of the Statute of Frauds, no oral or parol evidence [as in the instant case] is utilized to compose the employment agreement. Rather, the court concluded that "the corporate minutes, together with the signed [stock] agreement constitute a sufficient memorandum in writing to meet the requirement of the Statute of Frauds."

Plaintiff, however, relies on Soteraides' paraphrasing of earlier Ohio cases. Plaintiff states:

> Further, an internal document produced by the party to be charged with its terms is sufficient to satisfy the requirements of a writing under R.C. 1335.05, even if the document itself is unsigned, as long as a signed document which is logically

> related thereto exists. Soteriades v. Wendy's of Fort Wayne. Inc., 34 Ohio App.3d 222, 517 N.B.2d 1011 (Ct. App. Franklin Cty. 1986).
>
> Pl.['s] Opp'n Br. at 17.

Plaintiff foreshortens the earlier quote of Soteriades which ends:

> even though only one such writing is signed, if the signed writing refers to the unsigned writing or if it appears by inspection and comparison of the writings that they logically relate to or form part of the same transaction. See Thayer v. Luce (1871), 22 Ohio St. 62, and McGilvery v. Shadel (1949), 87 Ohio App. 345, 43 O.O. 74, 95 N.E. 2d 1. See also, Restatement of the Law 2d, Contracts (1979) 543, Section 208.
>
> Soteriades at 225.

Like Soteriades, both Thayer and McGilvery dealt with several writings, one or more of which were signed and one was unsigned. None, like the present case, involve a signed writing modified in part and supplemented in part by oral or parol statements. Hence, neither Soteriades or Thayer or McGilvery provide controlling precedent that supports the plaintiff's reliance on either Soteriades or Thayer.

Plaintiff asserts:

In order to evaluate whether any writing existed which embodied the essential terms of the agreement, the essential terms of the financing proposal must be identified:

> 1. The amount of the financing - $23.5 Million
>
> 2. The type of financing - HSPP MORAN bonds would b[e] issued to institutional investors. These bonds would be sold by The Huntington Company, and they would charge a fee of 1.25 % for this service.
>
> 3. The MORAN bonds would be supported by a $23.5 Million letter of credit issued by defendants.

Pl.['s] Opp'n Br. at 18.

This itemization ignores plaintiff's own testimony that the contract on which plaintiff bases its Second Cause of Action is the letter agreement of November 23, 1988 (Plaintiff's exhibit 275) as modified orally. Mr. Shanker so testified. Contrary to the plaintiff's foregoing statement, the essential terms must

include the letter agreement of November 23, 1988, and the oral modifications made by Mr. Whitman, note 6, page 39 and, by Mr. Caruso, his alleged oral promise to commit Huntington National Bank to issue an unrestricted $23,500,000 letter of credit.[6]

Applying the Ohio Statute of Frauds law, *supra* at 39, and considering the essential elements of the alleged contract as just specified, plaintiff must show that the written agreement of November 23, 1988, as orally modified, was thereafter specifically reaffirmed and agreed to by the parties in subsequent written documents. Bearing plaintiff's formidable hurdle in mind, the court now examines the documents which plaintiff says:

> relate to this transaction, and which were generated by the defendants, [and which] contain the essential terms of the contract.

---

[6] The defendants assert other "critical terms" that are not included in the November 8, 1988 letter and its attachments, signed on November 23, 1988. These are:

(a) personal guarantees from Mr. Owen and Mr. Shanker, rather than a non-recourse transaction which Mr. Shanker previously required; (b) a mortgage on the partnership property with the proposed building; and (c) an assignment of the critical County lease.

Def.['s] Mot. at 23.

Plaintiff identifies these documents as Exhibit 275, Exhibit 41, Exhibit 269, Exhibit 48, Exhibit 49, Exhibit 50, Exhibit 51, Exhibit 272, Exhibit 219, Exhibit 10, and Exhibits 136-141.

Exhibit 42, not 41, is "an internal telephone message slip referencing a call from Shanker to Whitman indicating, "Go w/ 7 day MORANS now," dated November 23, 1988. This memorandum tends to corroborate that, on November 23, 1988, MORANS were orally agreed to be substituted for the "terminator" financing proposal.

Of the other enumerated documents Exhibit 51 seems to come the closest to constituting a written statement of terms and conditions of the transaction. Apart from the fact that it was not signed or agreed to by either the plaintiff HSPP or Huntington National Bank, there are several obvious respects in which Exhibit 51 does not replicate the November 23, 1988 agreement, as orally modified. As to the description of the Letter of Credit, it does not say that it will be an unrestricted Letter of Credit, which Mr. Caruso allegedly committed Huntington to issue. Also, it states that the Letter of Credit will expire on January 15, 1994, which is obviously for a shorter term than the allegedly promised 78 months duration (construction period plus the first term of the lease). Moreover, on its face, it is not a fixed proposal. It specifically states in bold type:

THE TERMS OF THE TRANSACTION ARE

SUBJECT TO CHANGE AND THIS SUMMARY DOES NOT CONSTITUTE AN OFFER TO SELL OR THE SOLICITATION OF AN OFFER TO BUY ANY OF THE NOTES. AN OFFER MAY BE MADE ONLY WITH THE PRIVATE PLACEMENT MEMORANDUM.

Pl.['s] Ex. 51.

Plaintiff HSPP has not referred the court to any specific parts in any of the listed documents which replicate and reaffirm the elments of the written agreement of November 23, 1988, as orally modified, set forth *supra* at 44 and 44. Nor has the court found any such specific parts in any one or more of the documents. Additionally, not one of the listed documents were the parties. Under the foregoing circumstances, it is determined that the November 23, 1988 signed written agreement, subsequently modified orally (as Mr. Shanker testified), even when considered in conjunction with the listed documents, do not satisfy the Statute of Frauds, R.C. 1335.04.

At trial, this court overruled the defendants' Motion for Judgment as a Matter of Law on the Statute of Frauds ground. In so doing, the court stated, in substance, that the foregoing documents constituted written memoranda that took the November 23, 1988 letter agreement, as orally modified, out of the Statute of Frauds. The court now has had ample time to examine those documents. For the reasons previously stated, thi:

court concludes that these documents, which plaintiff asserts "contain the essential terms of the contracts," do not contain the essential terms of the alleged contract. Agreed in writing, in part, on November 23, 1988, the essential terms of the agreement were orally modified and supplemented, as Mr. Shanker testified.

The first paragraph of the Statute of Frauds ends:

> or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

The plaintiff must show that in initialing the change from $22,000,000 to $23,500,000, Anthony J. Caruso was "lawfully authorized by Huntington National Bank and thereby bound the Bank to the issuance of an unrestricted Letter of Credit for that amount. Plaintiff HSPP says as much in its arguments at pages 21 and 22 of its Opposition Brief which thus concludes:

> There was ample evidence before the jury that the essential terms of the financing agreement were contained in the documents executed on November 23, 1988, and those prepared shortly thereafter and shown to the partnership. The jury found that defendants, employees had the apparent authority to bind the defendants to a contract and therefore, it follows that the jury found that these same employees

> had the apparent authority to sign documents memorializing the contract. There was ample evidence before the jury for them to reach this conclusion, and the court should allow their findings of fact to stand.
>
> Pl.['s] Opp'n Br. at 22.

In Part III-B, this court determined as "a matter of law that plaintiff HSPP failed to offer sufficient evidence at trial to meet each of the two 'apparent authority' requirements of Master Consolidated," *supra*, at 33. It follows that plaintiff does not and cannot satisfy the Statute of Frauds requirement that Anthony J. Caruso was lawfully authorized by Huntington National Bank to sign (by his initials) the letter agreement of November 23, 1988.

Because it is determined that the, plaintiff's listed documents do not take the alleged agreement out of the Statute of Frauds, and because Huntington National Bank did not lawfully authorize Anthony J. Caruso to sign the letter agreement of November 23, 1988, on this additional ground, judgment as a matter of law is granted in favor of the defendants.

V.

Defendants next urge that, "There Is No Evidence That HNB's Alleged Breach Of Contract Caused The Partnership To Sustain Any Compensable Damages." Under that heading, the defendants present for argument:

(a) Ordinarily, The Sole Measure of Damages for the Breach of a Contract to Lend Funds is Additional Cost for Alternative Credit.

* * * *

The partnership introduced no evidence to show any increased costs for replacement financing. Therefore, to recover any damages, the partnership must show that HNB had reason to foresee that the partnership would be unable to obtain funds elsewhere.

* * * *

Here the partnership introduced no evidence that HNB had reason to believe the partnership would be unable to obtain alternative financing.

****

(b) The Partnership Introduced No Evidence That any Damages Were the Natural and Forseeable Consequence of HNB's Alleged Breach.

* * * *

(c) The Partnership Failed to Prove Lost Profits With Resonable Certainty.

* * * *

[N]o evidence supports the jury's finding that "past lost profits" totaled $6,154,903.

* * * *

This jury's "findings of such past lost profits is pure conjecture. The partnership apparently argues that it lost all profits including the profits it hoped to earn over the next 26 years, when the alleged breach occurred. If that were true, no plaintiff would ever show future

loss profits, since the loss always occurs before trial. The law cannot accept such sophistry.

(d) The County's Termination of the Lease Put an End to any Liability HNB may Have had for the Partnership's Supposed Loss.

Pl.['s] Opp'n Br. at 25-32.

In its opposition brief plaintiff HSPP counters in part:

> The precise issue was the timing of the financing. At all times in their relationship with HSPP, defendants knew that the viability of the project was dependent on timely financing. Caruso, Buxton, Whitman, Owen, and Shanker all testified that time was of the essence in the transaction. The jury had sufficient evidence before it of the consequences of a delay in financing and the knowledge of defendants to the potential damages which would result.
>
> * * * *

> In this case, there was evidence provided to the jury that no financing had been received from John Hancock for this project. To be sure, there was a proposal from John Hancock that was accepted by HSPP, but no actual financing occurred due to the inability of HSPP to meet Hancock's conditions. These conditions, most of which related to the lease, were not required by defendants herein, and did not exist in the agreement between defendants and HSPP.
>
> Pl.['s] Opp'n Br. at 23-24.

Plaintiff HSPP responded to the remaining arguments of the defendants under the two following headings:

> DAMAGES FOR BREACH OF CONTRACT WERE PROVED WITH REASONABLE CERTAINTY.
>
> AND
>
> THE COUNTY'S TERMINATION OF THE LEASE PUT AN END TO ANY LIABILITY HNB MAY HAVE HAD FOR THE PARTHERSHIPS ALLEGED LOSS.

During the trial, this court dealt with the defendant's defense of an invalid lease. In the following oral opinion delivered on April 28, 1993, this court ruled:

> In its fifth defense, the defendant asserts:
>
> > The transaction for which the plaintiff sought financing and other sources from the defendants was unlawful and defendants have no responsibility for failure to aid an unlawful transaction.
>
> Based on that defense and evidence defendants propose to offer, defendants have submitted proposed jury instruction No. 15. In short, it asks me to charge the jury that the County Partnership lease was invalid for failure to comply with Ohio statutes relating to competitive bids for a government contract.
>
> On December 30, 1988 the defendants submitted a commitment letter to issue a letter of credit providing for direct payment of certain obligations of Human Services Plaza Partnership, namely, its $23,500,000 Multi Option Adjustable Rate Notes due January 1, 2004 (the "Notes"). The Direct Pay Letter of Credit stated that it was "subject to the following terms and conditions."
>
> Relevant to our present question, I note that 21 pre-closing conditions are set forth on pages 4 through 9. None of these required the borrower to establish the validity of the

County-Partnership lease. While Condition 20 specified that borrower shall provide a favorable opinion on "valid execution and delivery and binding effect of the documents this condition did not require the Borrower to show or prove the validity of the County-Partnership lease.

Under the recognized construction of contracts principle that a specific term governs [and] supersedes any general term, I find the specific language (and omission) of Condition 20 supersedes and controls, rather than Condition 7 which states:

> All existing and future leases or agreements shall be subject to approval by Huntington. . .

Thus the commitment letter of December 30, 1988 contains no requirement that the Partnership must show or prove that the County lease it signed on or about December 19th was valid and enforceable under Ohio law.

Presumably receiving the signed lease on or about December 19th, there was ample time for Huntington to include such a condition in the December 30, 1988 Direct Pay Letter of Credit Commitment Letter.

Plaintiffs executed the $825,000 promissory note on or about August 25, 1988 pursuant to the loan letter agreement of June 29, 1988. The latter agreement [Defendant's Exhibit D-45] in numbered sub-paragraph 5.c. provided, in part:

> Borrower shall, on or before October 1, 1988, enter into a lease, in form and content acceptable to Huntington, with Cuyahoga County.

The date of October 1, 1988 was not a deal breaker date, given the fact that Huntington raised no objection, apparently, that the lease was not executed and signed by the County and the Partnership until December 19, 1988.

While the "form and content" of the lease, under paragraph 5.c., *supra*, had to be "acceptable to Huntington," the court does not read either form or content to mean that the lease form and its content had to include a showing that the lease had complied with Revised Code § 307.86's requirement of competitive bidding. Nor did the Lease executed and signed on December 19, 1988 include any reference to compliance with revised Code § 307.86.

Parenthetically, the court notes that neither R.C. § 307.86, nor Judge Potter's ruling in Yoder v. County of Williams 48 Ohio App.2d 36 (1976) defines or explains what comprises competitive bidding. However, in this court's view of this case, it is not required to interpret that cryptic language or determine whether or not, Cuyahoga County engaged in procedures of competitive bidding before it entered into the lease with the partnership. In this court's view of the case, the lease validity question must be considered within the time frame of December 19th - December 30, 1988. If Huntington wanted to condition its December 30, 1988 Direct Pay Latter of Credit Commitment on

a condition that there be a legal opinion of the Cuyahoga County Prosecutor that the lease was valid or on some showing of validity, such a condition could have been inserted in its December 30th commitment letter. It did not do so.

This court concludes that Huntington may not, after that period passed, later seek to take advantage of any later raised doubt about the validity of the County Partnership Lease. John Hancock raised the question in the summer of 1989 and the County obtained a legal opinion from outside counsel in August of 1989. But, even now there has been no adjudication of lease invalidity.

This court declines to include in the germane issues of this case an adjudication of the legality of the December 19th, 1988 lease.

Hence, respectfully to all parties as follows, this court concludes:

(1) The court will not permit Huntington to offer any information or other evidence, from which this court would then be required to rule on lease validity.

(2) While it is quite true that the existence of the December 19th lease was the security sine qua non of the plaintiffs obtaining a Letter of Credit Commitment letter between December 30, 1988 and January 20, 1989, it is evident by their actions and conduct the plaintiffs and Huntington assessed that

the executed lease of December 19th provided that security.

(3) The critical time period in which the trier of fact must resolve the issues of this case ends with Huntington's withdrawal of its Letter of Credit Commitment Letter on or about January 20, 1989. Since Huntington had not, by then, raised any question as to the lawfulness of the County's action in the proceedings in which it engaged before signing the lease Huntington will not now be permitted to raise the issue of the lawfulness of the County's action. Accordingly, the court will not give defendant's requested Instruction No. 15.

(4) The plaintiffs have made it clear that through the present witness and at least one other witness they are offering evidence to cure the lease in anticipation of defendants affirmative defense of lease invalidity and their claim of Cuyahoga County's unlawful action.

Yesterday afternoon, orally at side bar, this court indicated on the record why I now decide that plaintiffs may not through the testimony of Mr. Nicklos or other witness or by any document attempt to show either that the County-Partnership lease of December 19th could be cured or that such lease was in fact a valid lease.

(5) For purposes of the contract claims of the plaintiffs against Huntington this court will assume that as of December 19th, when executed, the lease was valid and enforceable.

This court now decides that it is unnecessary to consider and rule upon the defendants' foregoing arguments which they say demonstrate "four fatal flaws in the jury's damage award." It is determined that granting Judgment as a Matter of Law in favor of the defendants on the two grounds stated in parts I through IV above, moots the necessity of reaching and passing on defendants, arguments on the subject of the Jury's award of damages to the plaintiff HSPP.

For the same reasons, granting Judgment as a Matter of Law in favor of the defendants moots the need to consider and pass on their argument that "No Evidence Supports A Judgment Against HMC." Finally, the foregoing granting of defendants I Motions for Judgments as a Matter of Law moots their alternative motion for a New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/
William K. Thomas
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

MEMORANDUM AND ORDER

United States District Court
Northern District of Ohio
Eastern Division

Human Services Plaza Partnership; et al., Plaintiffs,	)	
vs.	)	Case No. 1:90CV811
Huntington National Bank; et al., Defendants.	)	

MEMORANDUM AND ORDER

Thomas, Senior Judge

In its Motion for Judgment as a Matter of Law, plaintiff, HSPP:

> [S]eeks to have this court enter judgment that defendant Huntington National Bank violated 12 U.S.C. §1972 when it conditioned the issuance of the letter of credit upon plaintiff having to provide a release of its property rights, and when HSPP was required to deal with the Huntington affiliates exclusively.
>
> Further, if the court determines that Huntington Mortage Company ("HMC") was an agent for Huntington National Bank ("HNB"), then the portion of the judgment rendered against HMC should be assessed against its principal, HNB.
>
> Pl.['s] Mot. at 1.

As to plaintiff HSPP's latter request to assess the HMC judgment against HNB, the Memorandum and Order filed contemoraneously herewith has granted Judgment as a Matter of Law in favor of Huntington National Bank and Huntington Mortgage Company. Thus, the money judgment in favor of plaintiff HSPP is erased. Clearly this grant of in Judgment as a matter of Law moots the necessity for this court to consider plaintiff's latter request.

With regard to the plaintiff's first request, the subject posed a factual isssue. This was left to the purview of the jury, and this court believes properly. Whether or not under the relevant facts in the record Huntington National Bank violated 12 U.S.C. § 1972 was a question for the jury to decide. Plaintiff's § 1972 allegation was based on the factual evidence, it is not a question for the court to determine as a matter of law. The jury's finding for the Huntington National Bank will not now be disturbed.

Accordingly, Plaintiff's Motion for Judgment as a Matter of Law, filed June 8, 1993, is hereby respectfully overruled.

IT IS SO ORDERED.

/s/
William K. Thomas
United States Senior District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Nos. 94-3362/3365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUMAN SERVICES PLAZA PARTNERSHIP, ET AL., Plaintiffs-Appellants/ Cross-Appellees,	)	
v.	)	ORDER
HUNTINGTON NATIONAL BANK, ET AL., Defendants-Appellees/ Cross-Appellants.	)	

BEFORE: MARTIN, NORRIS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX E

12 U.S.C. § 1972

Title 12 - Banks and Banking
Chapter 22 - Tying Arrangements

-Head-

Sec. 1972. Certain tying arrangements prohibited; correspondent accounts

-STATUTE-

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement -

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.

APPENDIX F

OHIO REVISED CODE § 1335.05

Ohio Revised Code § 1335.05

1335.05 Certain Agreements to be in Writing

No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to change an executor or administrator upon a special promise to answer damages out of his own estate; nor to change a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

No action shall be brought to charge a person licensed by Chapter 4731 of the Revised Code to practice medicine or surgery, osteopathic medicine or surgery, or podiatric medicine and surgery in this state, upon any promise or agreement relating to a medical prognosis unless the promise or agreement is in writing and signed by the party to be charged therewith.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RULES 11(A) AND 11(B)

Rule 11. APPENDIX

(a) Purpose of Appendix. The purpose of the appendix is to assist the judges in reviewing the briefs and in preparing for oral argument by providing to them those parts of the record necessary for effective understanding of the questions raised in the briefs. The appendix is not intended to be a substitute for the record; the court has it available and will consult the entire record whenever it becomes necessary.

(b) Designation of Contents. The appellant shall file and serve as an addendum to the appellant's brief a designation of those parts of the record to be included in the joint appendix. The appellee shall file and serve as an addendum to the appellee's brief a cross-designation setting forth any parts of the record the appellee wants included in the joint appendix that do not appear in the appellant's designation.

A designation of appendix contents included in the addendum to a principal brief shall not be counted against the page limitations applicable to that brief.

Counsel should consult the contents requirements set forth in subdivisions (f) and (g) of this local rule. Parts of the record not included in the joint appendix may, nevertheless, be relied upon by parties in presenting arguments and by the court in disposing of the case.

In designating the contents of the joint appendix, counsel should be mindful that inclusion therein of parts of the record unnecessary to the disposition of the case, or omission therefrom of parts of the record necessary to the disposition of the case, imposes a burden on both the parties and the court may result in sanctions pursuant to subdivision (l) of this local rule.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAPTERS 14, 16.3 AND 16.4
INTERNAL OPERATING PROCEDURES

Excerpts from Internal Operating Procedures of
the United States Court of Appeals for the Sixth Circuit
Chapters 14 and 16

CHAPTER 14. Transmission of Record on Appeal

The clerk of the district court will transmit the record on appeal when requested to do so by the clerk of the court of appeals. It is unnecessary to designate the entire record of district court proceedings for transmission to the court of appeals particularly where the record is unusually voluminous. See Fed.R.App. 11 and 12.

14.1 Exhibits. Counsel is responsible for arranging with the district court for the transmission of demonstrative evidence to the court of appeals. Manageable paper exhibits may be transmitted as part of the record on appeal and, in order to call them to the court's attention, may appear as a separate volume of the appendix. The district court will not automatically include these exhibits with the record; therefore, they must be designated and a request made for their transmittal. Bulky paper exhibits, physical exhibits and any contraband are never to be transmitted to the court of appeals without the express written permission of the clerk of the court of appeals. Fed.R.App. P.34 sets forth the procedures for use of physical exhibits at oral argument.

Sealed Records. Where a record has been transmitted to the court of appeals which has been sealed, in whole or in part, by order or other direction of the district court, the court of appeals will accord the record the same confidential treatment during the pendency of the appeal. The sealed item(s) will be unsealed and made a part of the public record only upon the order of the district court or the court of appeals.

Counsel should make certain that any exhibit or pre-sentence investigation report has been properly made a part of the record before the district court, before it is forwarded to the court of appeals. (Effective June 12, 1991)

CHAPTER 16. Appendix

16.3 Contents and Organization. 6th Cir.R. 11 sets forth very specific requirements for preparation of the joint appendix, and counsel should carefully consult and follow this local rule when preparing it.

16.4 Number of Copies. Five copies of this joint appendix are to be filed. One additional copy shall be served on opposing counsel.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Human Services Plaza Partnership, et al.,	)	Case No.1:90 CV 0811
Plaintiffs,	)	Judge
	)	William K. Thomas
vs.	)	
	)	
Huntington National Bank, et al.,	)	Amended Complaint (Jury Demand
Defendants.	)	Endorsed Hereon)

The plaintiffs, by leave granted by this court, hereby set forth their Amended Complaint as follows:

Subject Matter Jurisdiction

This suit is commenced pursuant to 12 U.S.C. §1972, et seq., commonly known as the Bank Holding Company Act Amendments of 1970 (BHCA). This court has subject matter jurisdiction pursuant to said Act, and more particularly pursuant to 12 U.S.C. §1973. This court also has pendent jurisdiction over the related state and common law claims.

Count I - Jurisdiction & Venue

1. Plaintiff Human Services Plaza Partnership (hereinafter sometimes referred to as "HSPP" or "Partnership") is an Ohio general partnership with its principal place of business in Cleveland, Ohio. Plaintiff Howard Shanker is a general partner in said partnership and has a ninety-nine percent (99%) interest therein.

2. Defendant Huntington National Bank (hereinafter "Bank") transacts business in Cleveland, Ohio, as a commercial banking institution, and thereby holds itself out as a knowledgeable commercial, construction and real estate lender with sufficient resources to undertake and consummate lending obligations to and for real estate projects such as that proposed by plaintiffs to defendant.

3. Defendant Huntington Mortgage Company (hereinafter "Mortgage") is believed to be a wholly owned subsidiary of, or entity controlled by defendant Bank, and transacts business in Cleveland, Ohio, as a mortgage lender and thereby holds itself out as a knowledgeable mortgage banking institution with resources sufficient to undertake and consummate lending obligations to and for real estate projects such as proposed by plaintiffs to defendant Mortgage.

4. Defendant Huntington Company (hereinafter

"Company") is believed to be a wholly owned subsidiary of, or entity controlled by defendant Bank, and transacts business In Cleveland, Ohio, as a financial advisor to business entities such as plaintiff and thereby holds itself out as having certain expertise and resources to undertake and complete obligations to and for entities such as plaintiff engaged in the business of real estate development construction, leasing and sales.

Count II - Breach of Contract

5. Plaintiffs reaver the allegations contained in paragraphs 1 through 4 above as if fully written herein.

6. In June of 1988, HSPP entered into definitive financing discussions with the above-named defendants, in their various capacities, for the financing of a certain building to be known as The Cuyahoga County Human Services Plaza Building (the "Project").

7. The aforementioned Project contemplated the plaintiffs entering into a lease with option to purchase agreement with the County of Cuyahoga for property located at S. 17th Street and Superior Avenue, Cleveland, Ohio. Plaintiffs were to construct thereon by a date certain, to the specifications of the County, an office building to house the operations and staff of the Cuyahoga County Human Services and Child Support Enforcement Agency (hereinafter "lease/purchase").

8. Defendants Bank and Mortgage, by and through their conduct, oral representations and written agreements,

entered into a contract with HSPP to provide, by either direct loan or defendants' funds or by secondary borrowing secured by defendants' letter of credit, a loan or similar financing package for the undertaking and completion of the Project by plaintiff HSPP.

9. An part of the loan arrangement, plaintiffs undertook certain actions, including but not limited to:

(a) the acquisition of a real estate site located at 152O E. 17th Street, in the City of Cleveland;

(b) the payment of professional fees to engineers, - architects, attorneys and accountants which was to be compensated for services rendered for the design of the Project building and support of Partnership activities;

(c) payment to tenant(s) of the property located at 1640 Superior for relocation and business interruption expenses and costs;

(d) the demolition of the gas station located on the 1520 E. 17th Street parcel;

(e) the acceptance of Divco, Inc. as a partner, pursuant to the Bank's requirement;

(f) entering into a lease/purchase agreement with Cuyahoga County which conformed the lending requirements of defendants Bank and Mortgage;

(g) entering into a construction contract with Turner

Construction Co. to begin the construction of the subject Project premises;

(h) entering into interim loan agreements with defendant Bank at its insistence and as a condition of defendant Bank's continuing performance of its obligations under its agreements with plaintiff;

(i) changing title insurance companies at the order of defendants Huntington Bank and Mortgage;

(j) refusing to deal with other lenders offering similar or more advantageous "financing packages" for the Project and further observing the exclusivity agreement with defendant Company;

(k) contributing plaintiffs' funds to the operation of the Project during periods when defendant Bank refused to perform its interim lending obligations under its agreement with plaintiffs.

10. Plaintiffs undertook and fully performed each of the above undertakings in reliance on defendants' promised performance, and such were done at the direction of and with the participation and advice of defendants Bank and Mortgages and ultimately with the knowledge of defendant Company.

11. Defendant Bank and defendant Mortgage, as a

further condition of and in consideration for undertaking and performing their contractual obligations to plaintiffs, required plaintiffs to secure defendant Company as plaintiffs, exclusive representative and financial advisor during the undertaking of the Project and contract to pay a fee to such defendant Company for its services, which plaintiffs did.

12. Portions of the Agreement between defendants and plaintiff HSPP were reduced to written form in mid-November, 1988.

13. Through its conduct, representations and written memoranda, defendants committed to:

(a) loan HSPP funds sufficient to acquire the necessary land for the Project;

(b) loan Howard Shanker funds for the purchase of real property in order to relocate his business (hereinafter "E. 18th Street Loan");

(c) loan the Twenty-Four Million Dollars ($24,000,000.00) necessary to complete the overall project.

14. The $24,000,000.00 loan was to be used to pay off the initial Eight Hundred Twenty-Five Thousand Dollars ($825,000.00), and to provide funds whereby HSPP could pay Howard Shanker for the land he transferred to HSPP, which in turn would be used to pay off the loan on the E. 18th Street

Loan.

15. Plaintiffs fully performed their obligations but defendants only partially performed their respective obligations and breached their agreement with HSPP by failing to finance the $24,000,000.00 necessary for the Project.

16. Defendants Bank and Mortgage have acted unreasonably and did not deal in good faith, and thereby further breached their contract with plaintiffs.

17. Defendants Bank and Mortgage, through their conduct, statements and writings, had contracted to provide HSPP with a formal loan commitment in the amount of approximately $24,000,000.00, which defendants unreasonably and in bad faith failed to provide, and rather submitted to HSPP an unreasonable commitment for a fraction of the agreed-upon amount with unreasonable and unconscionable terms and conditions.

18. As a direct and foreseeable result of breach of defendants Bank and Mortgage, plaintiffs have been damaged as set forth in Count IX of this Amended Complaint.

Count III - Fraud in Inducement

19. Plaintiffs reaver the allegations contained in paragraphs 1 through 18 above as if fully rewritten herein.

20. On or about December 30, 1988, defendant Company breached its contract of financial commitment and thereby revealed that defendants Bank and Mortgage had either

intentionally misrepresented and/or with wanton and reckless disregard misrepresented their ability to loan funds to plaintiffs without the participation of other lenders. This situation had been concealed by defendants, and such misrepresentation induced plaintiffs into entering into all of the agreements with defendants, and plaintiffs forewent the obtaining of other financial arrangements with other lenders, and as a result of plaintiffs' reliance upon defendants' representations, it was damaged as set forth in Count IX of this Amended Complaint.

21. Plaintiffs further state that such representations of ability to perform their obligations under the agreements were wilfully made, or made with wanton and reckless disregard for plaintiffs' rights and were made, jointly and severally, by defendants for the specific purpose of obtaining control over plaintiffs' property and to place plaintiffs in an economic position where they could neither complete the Project, nor seek alternative financing. As a result of such conduct, plaintiffs lost the project and had to eventually buy Divco Inc. out of its interest, thereby causing plaintiffs to suffer an additional Five Hundred Thousand Dollars ($500,000.00) in damages.

Count IV - Estoppel, Equitable Estoppel, Promissory Estoppel and Detrimental Reliance Waiver

22. Plaintiffs reaver the allegations set forth in paragraphs 1 through 21 above as if fully rewritten herein.

23. Defendants Bank and Mortgage, by their collective conduct, statements and writings, which were relied

upon by plaintiffs, caused plaintiffs to materially change their position to HSPP's detriment.

24. Defendants Bank and Mortgage represented to HSPP that if a certain resolution pertaining to a lease for the Project was obtained, defendants would finance the Project.

25. HSPP, in reliance on the defendants' representations, writings and conduct, entered into a lease with Cuyahoga County, purchased real property at a substantial premium contracted with architects, building contractors, and various professionals, contracted for the relocation of tenants, demolished a building, and took on a partner that otherwise would not have been taken one along with other detrimental conduct, including not seeking financing for its Project elsewhere and making substantial expenditures of capital.

26. All of the above conduct was done with the explicit consent and knowledge of defendants Bank and Mortgage, and with the understanding that Bank and Mortgage were going to finance the Project.

27. Defendants Bank and Mortgage know HSPP was acting in reliance on the defendants' representations that they would fully fund or finance the Project.

28. Defendants Bank and Mortgage wrongfully refused to fully fund the Project after they had partially funded the same, and after HSPP had substantially changed its position

in reliance on defendants.

29. As a result of Bank's and Mortgage's refusal to fully perform, HSPP lost its Project and has been damaged as set forth in Count IX of this Amended Complaint.

Count V - Negligence of Defendant Company

30. Plaintiffs reaver the allegations contained in paragraphs 1 through 29 above as if fully rewritten herein.

31. On or about November 8, 1988, plaintiffs and defendant Company ratified their agreement appointing Defendant Company as the exclusive financial advisor and agent, and agreed to pay defendant Company a fee of at least Three Hundred Thousand Dollars ($300,000.00), plus interest, and "professional fees" for defendant Company's performing its obligation to plaintiffs thereunder. Defendant Company further represented that it would undertake certain duties on behalf of plaintiffs, including but not limited to:

(a) development of a financial operating structure;
(b) negotiation of the terms and interest of the Project financing;
(c) "selling" the Notes which would constitute the financing of the Project;
(d) identify the "source" of the financing.

32. Defendant Company was fully aware of the timetable of the closing, and under its agreement with plaintiffs, defendant company was to obtain the necessary funds to close the transaction.

33. Plaintiffs state that defendant Company, in the discharge of its duties, failed to exercise due care and failed to obtain any other "sources" of funds other than defendants Bank and Mortgage, which are related entities, with either:

(a) full knowledge that defendants Bank and Mortgage did not have sufficient resources to perform their obligations under their agreements with plaintiffs; or

(b) no knowledge of inability of defendants Bank and Mortgage to perform their obligations to plaintiffs, said lack of knowledge due to defendant Company's failure to undertake due diligence in its investigation of potential lende.s an advisors for plaintiffs.

34. Defendant Company was in a position to know whether or not defendants Bank and Mortgage could perform their obligations as not forth herein and negligently failed to inform plaintiffs of this information, and was negligent in advising or failing to properly advise plaintiffs with respect to the funding of the Project.

35. Plaintiffs further state that as a result of defendant Company's above negligence, which proximately

caused plaintiffs' foreseeable injury, they have been so injured by losing the project and suffering damages as enumerated in Count IX of this Amended Complaint.

Count VI - Breach of Fiduciary Duty - Defendant Company

36. Plaintiffs reaver the allegations contained in paragraphs 1 through 35 above, as it fully rewritten herein.

37. Plaintiff a state that an agreement with defendant Company established a fiduciary relationship and the discharge of the duties of a fiduciary hereunder included but was not limited to:

> development of the basic financing structure negotiation of the general terms and conditions of the Notes with prospective Note purchasers, identification of prospective purchasers of the Notes, and coordination of the closing process to facilitate a successful and timely closing.

And that defendant Company breached its duty as a fiduciary by undertaking only to obtain a letter of credit from related defendants Bank And mortgage and not from any other outside entity. As a result of the failure of defendants Bank and Mortgage to perform and/or inability to perform, defendant

Company breached its fiduciary duty to plaintiffs and has, by virtue of only dealing with related companies self dealt.

38. As a result of Company's breach of fiduciary duty and self-dealing, plaintiffs have lost their project and suffered the damages enumerated in Count IX of this Amended Complaint.

Count VII - Bank Holding Company Act Claim

39. Plaintiffs reaver the allegations contained in paragraphs 1 through 38 above, as if fully rewritten herein.

40. Huntington violated the anti-tying provisions set forth under 12 U.S.C. §1972 by, among other things, improperly requiring Howard Shanker and The Michael Shanker Trust and Human Services Plaza Partnership, as a condition of obtaining a loan and Huntington's loan commitment, to place Howard Shanker's real property into a partnership and additionally requiring that Divco, Inc. become a partner in that partnership.

41. The partnership (HSPP) was forced by defendant Bank to enter into an exclusive dealing arrangement with Huntington Bank's wholly-owned subsidiary or affiliated company, Huntington Company. The purpose of this exclusive dealing agreement was to prevent competitive lending institutions from having an opportunity to obtain HSPP's business, and to prevent HSPP from seeking certain financial services elsewhere.

42. Huntington Bank and its subsidiary, Huntington Mortgage, also forced Howard Shanker to have HSPP allow a mortgage lien to be placed against the partnership real property as collateral for a personal real estate loan on a certain parcel of real estate located at E. 18th Street and Chester Avenue, which is owned exclusively by Howard Shanker and his wife. This was a condition of obtaining the E. 18th Street property loan.

43. The exclusive dealing agreement between HSPP and Huntington Company caused injury to HSPP and Howard Shanker in their business by not allowing them to obtain credit elsewhere. Subsequently, the Huntington defendants placed such unreasonable additional conditions on the ultimate loan commitment that it caused plaintiffs to lose the County Project and damaged plaintiffs as set forth in Count IX of this Amended Complaint.

44. Huntington Bank's requiring that Howard Shanker's, real estate be placed in a partnership and that Divco, Inc. become a partner therein, damaged Howard Shanker and HSPP in an amount in excess of Five Hundred Thousand Dollars ($500,000.00), which was the amount paid to Divco, Inc. in order to obtain its interest in the partnership back when the County Project collapsed.

45. Huntington Bank, as a condition of extending credit to HSPP and Howard Shanker, required both Howard Shanker and David Owen to obtain the guarantees of their respective spouses, each of whom had no interest whatsoever in

either the County Project or HSPP.

46. HSPP was also required by Huntington Bank to use the services of its wholly-owned subsidiary and/or related affiliate, Company, as a condition of obtaining credit.

47. Defendants Bank, Mortgage and Company forced HSPP into a tying arrangement by conditioning the much needed loan for the County Project upon the using of Company's financial advisory services.

48. Defendant Bank forced Howard Shanker and HSPP into a prohibited reciprocity arrangement by, among other things, requiring that assets be contributed to a partnership and by requiring an outside individual, Divco, Inc., to become a partner in HSPP. Further, defendant Bank required the personal guarantee of the respective partners' wives, who had no interest in the underlying transactions.

49. Defendants Bank and Company caused HSPP to enter into a prohibited exclusive dealing contract by requiring that HSPP deal exclusively with Company for the purpose of eliminating other lenders and to generate more fees for a related affiliate.

50. Defendants Bank, Mortgage and Company all benefitted from such prohibited activities by procuring loans, obtaining additional collateral, eliminating competition, and generating fees.

51. Howard Shanker and HSPP were injured in their business as a result of the above-described activity of the defendants, and as a direct result, suffered damages as set forth in Count IX of this Amended Complaint.

52. Pursuant to 12 U.S.C. §1975, plaintiffs' damages as met forth in Count IX which were caused by the violation of the Bank Holding Company Act are trebled. In addition thereto, plaintiffs will suffer substantial cost and attorney fees.

Count VIII - Negligence of Bank and Mortgage

53. Plaintiffs reaver the allegations contained in paragraphs 1 through 52 above, as if fully rewritten herein.

54. Bank and Mortgage were negligent in their dealings with plaintiffs as they know or should have known that the loan officer responsible for the HSPP loan file had on other occasions committed loan funds to customers of the defendants, when in fact the Bank had decided not to loan to said customers and those customers had relief similarly as have the plaintiffs.

55. Bank and Mortgage were negligent in their supervision of the loan officer on the HSPP loan file, which proximately caused the injuries to plaintiffs, the loss of the Project, and damages as set forth in Count IX of this Amended Complaint.

Count IX - Damages

56. Plaintiffs reaver the allegations contained in paragraphs 1 through 55 above, as if fully rewritten herein.

57. As a proximate result of defendants' acts and omissions as set forth in Counts II, III, IV, V, VI, VII and VIII, plaintiffs were damaged as follows:

(a) Loss of the Project:

(1) The lease signed by Cuyahoga County would have provided net rental income for the plaintiffs which was lost when the project failed as a direct result of defendants' acts and omissions. The lost rental income, net of debt service, for the initial five year period was $388,900.00 per year for a total of One Million Nine Hundred Forty-Four Thousand Five Hundred Dollars ($1,944,500.00).

(2) In addition, the interest cost of plaintiffs' bonds which were to be supported by defendants' letter of credit would have decreased since the issuance date of the bonds. The decreased interest payments on the bonds by plaintiffs would have

resulted in additional income in the amount of $250,000.00 per year over the initial five year lease period for a total of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

(b) Lost Profits: The Human Services Plaza Building which was to be built by plaintiffs had a value of $30,000,000.00 and a total cost to build of $23,500,000.00. The value was determined by an independent appraisal accepted as accurate by the defendants. The lost profit damages to plaintiffs at the time of defendants, breach was Six Million Five Hundred Thousand Dollars ($6,500,000.00).

(c) Consequential Special Damages:

(1) As a result of defendants' acts and omissions as herein described, plaintiffs were forced to purchase DIVCO's interest in the HSPP partnership and plaintiffs were damaged in the amount of Five Hundred Thousand Dollars ($500,000.00).

(2) As a result of defendants' acts and omissions as herein described, plaintiffs were forced to incur interest expense on the $600,000 East 18th Street loan which would otherwise have been repaid

by the sale of plaintiffs' bonds. The amount of unnecessary interest expense incurred by plaintiffs on this loan in believed to be approximately Two Hundred One Thousand Dollars ($201,000.00), which is a proximate and foreseeable damage caused by the defendants' breach. This amount continues to increase as defendant continues to accrue interest. The precise amount will be proved at trial as this information is within the control of the defendants.

(3) Hancock continues to seek additional amounts from plaintiffs as damages from the failure of the financing attempt, and plaintiffs pray that defendants be required to indemnify any and all amounts Hancock may recover against the plaintiffs, which is presently alleged by Hancock to be approximately Nine Hundred Thousand Dollars ($900,000.00), in excess of $1,230,000.00 they have already kept.

(4) Plaintiffs were forced to incur expenses, including attorney's fees, in the amount of Forty-Two Thousand Five Hundred Thirty-Two Dollars ($42,532.00) as a result of defending against defendants'

foreclosure action when plaintiffs could not repay the remaining balance on the $600,000 East 18th Street Loan. These damages would not have been incurred had defendants fulfilled their obligations to provide the letter of credit to support the sale of plaintiffs' bonds. The $600,000 loan was intended by the parties to have been repaid through the sale of plaintiffs' bonds, and the failure of defendants to supply the letter of credit proximately led to the need to defend against the foreclosure action.

(5) British Petroleum Corp. has sued plaintiff HSPP for $88,000.00 in environmental cleanup costs relating to plaintiff's acquisition of the filling station which occupied a portion of the lot where the County Human Services Building was to be constructed. This potential liability is a direct result of the acquisition of the Property which was unnecessary in view of the defendants' breach.

(d) Damages for Tortious Acts: As a result of defendants, tortious acts and omissions, plaintiffs have been damaged as set forth herein and further as will be proved at trial.

WHEREFORE, plaintiffs demand judgment against all defendants, jointly and severally in the amount as set forth herein, and to have said amount trebled pursuant to statute to Thirty-Four Million Five Hundred Thousand Dollars ($34,500,000.00), along with interest and reasonable attorney fees.

APPENDIX J

HUNTINGTON NATIONAL BANK ADVERTISEMENT

The Finer Points Of Precision Banking In Business Lending

Money. That's what business is all about. It takes money to make money. And to get the loan you need, you need bank that's willing to point your business to a more profitable future.

You see, at The Huntington, our Relationship Bankers work twice as hard. Not only do they make the loan, but they structure the loan so it's right for you.

They are trained to develop a clear perspective of your business and create a lending plan that matches your needs exactly. Huntington Precision Banking means an in-depth, accurate appraisal of your finances to give us an understanding of your capital needs today and in the future. Precision Banking is a clear understanding of leasing. It's structuring a leasing arrangement that fits your equipment needs and your financial situation while taking maximum advantage of the tax laws.

The point is our Relationship Bankers work twice as hard to find the right financing for you...whether it's seasonal working capital, an asset-based loan or a letter of credit.

If this doesn't sound like a precise description of your bank, talk to The Huntington.

APPENDIX K

HUNTINGTON NATIONAL BANK'S COMMITMENT LETTER

The Huntington National Bank
P.O. Box 5065
Cleveland, OH 44101

June 29, 1988

Mr. Howard H. Shanker
Shanker Industries
1127 Euclid Avenue
Cleveland, Ohio 44114

Re: Loan for Site Assembly and
Business
Relocation in Preparation of
Construction of Office Building
Located in Cuyahoga County, Ohio

Dear Mr. Shanker:

The Huntington National Bank (hereinafter "Huntington") is pleased to advise you that it is prepared to provide a mortgage loan for site assembly and business relocation in connection with the above-mentioned captioned project subject to the following terms and conditions:

Borrower:	Howard H. Shanker, individually, and David D. Owen, individually or a partnership to be formed.

Guarantors:	Howard H. Shanker, Carol Shanker, David D. Owen and Marilyn, jointly and severally.
Amount:	$825,000.00
Maturity:	January 1, 1989
Loan Commitment Fee:	One-half percent (½%) of the Loan Amount, i.e., $4,125.00, to be deemed earned and due and payable upon acceptance of this Commitment by Borrower.
Interest Rate:	Interest shall be computed at a rate which shall be one and one-half percent (1½%) per annum above the prime commercial rate of The Huntington National Bank from time to time in effect with each change in the said prime commercial rate automatically and immediately changing the rate of interest due hereon. The default rate shall be two percent (2%) greater than the stated interest rate.
Payments:	Interest calculated on a 360-day year due and payable monthly interest billing is

not received by Huntington prior to the tenth (10th) calendar day after the due date, Borrower agrees to pay a service charge equal to five percent (5%) of the amount of the installment then due for each month and portions thereof for which such installment is delinquent. In the event of prepayment of principal due to foreclosure of the mortgage securing the note, or other judicial sale, there shall be paid therewith a premium in the amount of five percent (5%) of the entire outstanding principal balance.

Disbursements: Subject to the conditions hereinafter set forth Huntington will disburse the loan proceeds upon the closing date.

Security: A first mortgage lien upon the real estate generally know as 1520 East 17th Street, Cleveland, Ohio (the "Sohio Site") and a third mortgage lien upon the real estate generally known as 1640 Superior Avenue, Cleveland, Ohio (the "1640 Site").

Acceptance of this commitment and payment of the Commitment Fee by Borrower shall constitute a binding agreement between the parties and the terms and conditions hereof shall survive the closing of the within transaction. The loan shall be closed within thirty (30) days from the date of acceptance hereof, otherwise Huntington's obligation hereunder shall terminate. This commitment shall become effective only upon receipt by Huntington, within then (10) days from the date hereof, of two copies of this letter with Borrowers' acceptance endorsed thereon and the Loan Commitment Fee. Neither this commitment nor the loan proceeds may be assigned by Borrower without Huntington's prior written consent. All documentation and forms required hereby shall be in form and content, and contain provisions acceptable to Huntington and its counsel.

Huntington's obligation to make the loan in the aforementioned amount is conditional upon the following pre-closing requirements.

1. Huntington is to be furnished with an ALTA Commitment for a Loan Policy of Title Insurance (the "Commitment") from a title insurance company acceptable to Huntington reflecting marketable title in Borrower and containing only those exceptions acceptable to Huntington.

2. Borrower will execute a note containing Huntington's standard insecurity clause and mortgage and such other documents as Huntington may require.

3. A separate guaranty agreement shall be executed by the Guarantors. The guaranty shall provide, among other things, that there shall be no transfer of major assets by Huntington.

4. The note must be secured by a valid first mortgage on the Sohio Site and a valid third mortgage on the 1640 Site. After the mortgage has been recorded, the title commitment is to be extended through that date and an ALTA Loan Policy of Title Insurance is to be furnished to Huntington naming Huntington as the Insured. The title to the Security is to be satisfactory to Huntington, free of all liens and encumbrances, other than the subject lien and those acceptable to Huntington, and the title company is to insure Huntington against the possibility of filed or unfiled mechanics' and materialmen's liens and as to matters of survey. Should the title insurance commitment contain exceptions for blanket, easements which cannot be located on the survey, it will be necessary for Borrower to locate the easements through their owner (e.g., utility companies) in order to have them located on the survey or eliminated as exceptions in the title insurance commitment.

5. The mortgage to be executed in consummation of this transaction shall specifically provide, among other things, for the following:

   a. There shall be no substitution of principals without the prior written consent of Huntington;

   b. There shall be not further encumbering or refinancing of the Security without prior written consent of Huntington; and

   c. Borrower shall, on or before October 1, 1988, enter into a lease, in form and content acceptable to Huntington, with Cuyahoga County, Ohio for use by the Department of Human Services and the Cuyahoga Support Enforcement Agency to occupy the contemplated building to be constructed on the Sohio and 1640 Sites.

   d. Borrower shall not file of record with the Cuyahoga County Recorder a consolidation plat of the Sohio and 1640 Sites without the prior written approval of Huntington.

6. All existing leases or agreements or any other leases or agreements hereinafter created in the Security shall be approved by Huntington and shall be assigned to Huntington as additional security for the loan. At Huntington's option, all leases and agreements will be

subordinated to Huntington's loan.

7. Neither the Borrower nor Guarantors shall have experienced any material adverse change in its/their financial condition(s) or creditworthiness. If Huntington determines that such change has occurred, then, at Huntington's option, this commitment shall terminate.

8. Cost and Fees: Borrower shall pay all costs and expenses incidental to the loan whether or not the loan is closed. Such costs shall include, but not be limited to, fees and out-of-pocket expenses of Huntington's counsel, title insurance premiums and costs, recording fees, appraisal fees, survey fees, inspection fees, revenue stamps and not and mortgage taxes, if any.

IN ADDITION TO THE FOREGOING, PRIOR TO CLOSING BORROWER SHALL PROVIDE HUNTINGTON WITH:

9. Copies of the applicable recorded or unrecorded plats of the Security.

10. A current property survey issued by a registered surveyor in conformance with Huntington's "Survey Requirement" standards. The survey must, among other things, locate all access roads, easements and other encumbrances set forth in the title insurance commitment. A copy of Huntington's survey requirements is available upon request. Access to and from the Security premises shall

be by public road.

11. Evidence that public water, sewer and other required utilities are available to the Security and that the Security is appropriately zoned for the intended use. Also, Borrower shall furnish evidence satisfactory to Huntington that all Federal, state and local environmental requirements have been complied with.

12. A Detailed Environmental Audit by a Qualified Environmental Engineer upon the Sohio and 1640 Sites.

13. Proof, acceptable to Huntington, that the Security is not located in a flood hazard area as designed by The Department of Housing and Urban Development; otherwise, Borrower shall purchase flood hazard insurance.

14. A descriptive, narrative appraisal by an appraiser acceptable to Huntington.

15. If a partnership is formed, certified copy of the partnership agreement, which shall authorize the partnership to borrow the funds herein contemplated and to secure repayment of such indebtedness by granting to Huntington a mortgage on the Security. The partnership agreement is to be satisfactory in all respects to Huntington. Huntington shall also require a certificate copy of the partnership certificate as filed with the

Cuyahoga County Recorder and any other appropriate authority.

Huntington's attorneys will be Porter, Wright, Morris & Arthur, 925 Euclid Avenue, Suite 1700, Cleveland, Ohio 44115 (Phone: (216) 443-9000). Huntington suggests that Borrower of Borrower's counsel contact John W. Waldeck, Jr. or William R. Weir of that firm with respect to this commitment and Huntington's closing requirements in connection with this loan. In addition, Huntington's commitment is further subject to the following post-closing requirement:

1. No funds shall be disbursed until Borrower is able to acquire title to the Sohio Site upon terms and conditions satisfactory to Huntington, which determination shall be made in Huntington's sole discretion.

Very truly yours,
THE HUNTINGTON NATIONAL BANK

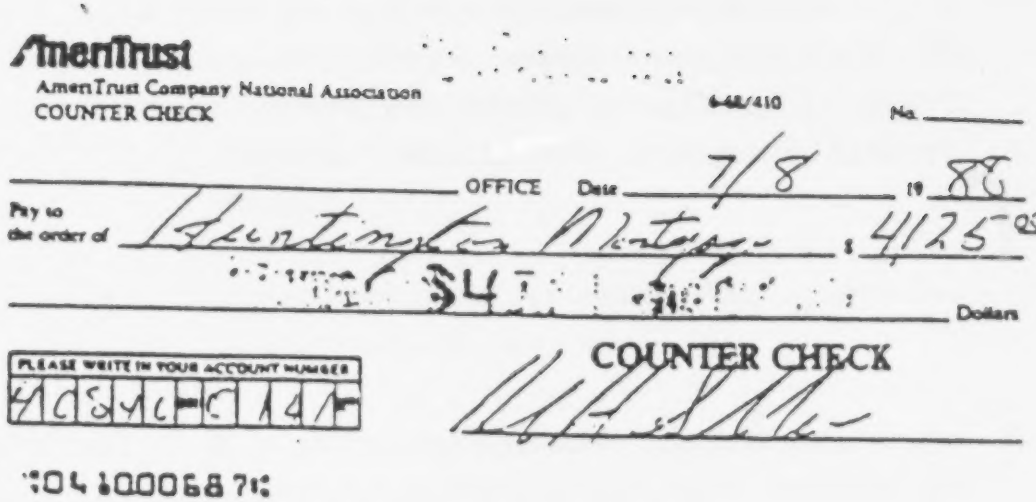
Anthony R. Caruso, Vice President

The undersigned hereby accept the foregoing commitment and agree to be fully bound by the terms and conditions thereof. Our Commitment Fee of $4,125.00 is enclosed.

DATE: July 8, 1988

Howard Shanker, individually

David D. Owen, individually


AmeriTrust
AmeriTrust Company National Association
COUNTER CHECK
648/410
No. _____
OFFICE Date 7/8 19 88
Pay to the order of Huntington Mortgage $ 4125.00
$4 Dollars
PLEASE WRITE IN YOUR ACCOUNT NUMBER
COUNTER CHECK
:04 100068 7:

APPENDIX L

Commercial Loan Facility Request

100169

COMMERCIAL LOAN
FACILITY REQUEST • 1 of 1

David D. Oven and Howard H. Shanker

BORROWER NAME or A Partnership to be Formed

ADDRESS 1127 Euclid Avenue, Cleveland, Ohio

TAX ID # 366-26-9780 ACLS # TOTAL AGGREGATE EXPOSURE: $825,000.00

RELATIONSHIP BANKER Anthony R. Caruso DIV/BANKING OFC. Cleveland - Real Estate

(X) New Bus. ( ) New Exist ( ) Line Adv. Exist Doc. ( ) Renewal ( ) Renewal Increase ( ) Renewal Decrease ( ) Restructure ( ) Renegotiated Yield % 9.90% Target Yield % 10.40

Amount Requested	Loan Type	Rate	Fees	Maturity	Quality / Risk Rating	Required Balances
$825,000.00	REM	Prime + 1½% floating	NONE	01/01/89	3	NONE

PURPOSE OF CREDIT

To provide funds for site assembly and business relocation in order to construct a new office building for Cuyahoga County Welfare Department under net lease.

TERMS OF REPAYMENT

If renewal under terms different than original explain fully.

Interest only payable monthly, principal due at maturity.

PRIMARY AND SECONDARY SOURCES OF REPAYMENT

1. Construction loan to be provided by The Huntington Mortgage Company.
2. Rents/cash flow of principals.

COLLATERAL

Collateral Description	Market Value	Encumbrances Prior Liens, Etc.	Market Value Net Of Encumb.	Loan to Value (%)	Valuation Date	Valuation Method
First Mtg - 1640 Superior	$575,000	-0-	$575,000	100%	09/25/87	MAI
Third Mtg - 1624 Superior	$575,000	$425,000	$150,000	100%	10/01/87	MAI

GUARANTORS

Name	% Guarantee	Security	Statement Date	Net Worth	Outside Net Worth	Liquid Assets	Prepared By
David D. & Marilyn Oven	100%		6/1/88	$1,345,965			Oven
Howard H. & Carol Shanker	100%		7/30/87	$2,589,000			Shank

COVENANTS, CONDITIONS, LOAN AGREEMENTS

CREDIT POLICY EXCEPTIONS

COMMENTS

REQUIRED SUPPORTING INFORMATION

COMMERCIAL LENDING DOCUMENTATION

( ) Agr-Comm. Prod. & Loss Bk.—E
( ) Assignment Note/Ledger—F
( ) Bonds & Debentures—C
( ) Consumer Purpose—A
( ) Corp. Borrowing Documents—A
( ) Futures—E
(✓) Guaranty Corp. ____ Part. ____ Part. ✓—A
( ) Life Insurance—A
( ) Marketable Securities—E
( ) Promissory/Installment Note—A
(✓) Private Borrowing Documents—A
( ) RE Construction Loan—G
( ) RE Commercial Mortgage Loan—G
(✓) RE Secured Mortgage Loan—E
( ) Passbook/Savings—E
( ) Savings Account—C
( ) Stky. LIC—F
( ) Stocks—C
( ) Time Certificates—C
( ) Various/Floating Assets—E
( ) Other

SPECIAL INSTRUCTIONS

(✓) All Documents Attorney prepared
( ) Preliminary Waiver Opinion
( ) Legal Opinion/Review
( ) Loan Agreement
( ) Reg AA
( ) Reg O
( ) Subordination Agreement
( ) Other

APPROVALS

OFFICER	SIGNATURE	DATE
Account Officer	Anthony R. Caruso	06/24/88
Supervisor		
Manager		
Other		
Other		
Spec. Asset		

DISBURSEMENTS

CREDIT DDA NO. 01661623362 IN THE NAME OF HUMAN SERVICES PLAZA PARTNERSHIP	$ 78,625.00
CREDIT DDA NO. 01661613466 IN THE NAME OF STATE TITLE COMPANY	427,334.75
Order to Disburse Proceeds form, signed by customer. Total requests for disbursement to other than borrowers.	$505,959.75

COMMITTEE ACTION

Regional/Affiliate: ( ) Appr. ( ) Approves ( ) Over. ( ) Declined ( ) Tabled ( ) Refer to Senior

NORTHERN REGION LOAN COMMITTEE

HNB - OHIO

Senior: ( ) Appr. ( ) Approves ( ) Over. ( ) Declined ( ) Tabled ( ) Rec. to Bd. of Dir. ( ) Appr. Bd. of Dir.

Secretary

PLAINTIFF'S EXHIBIT 6 12/20/90 JV

PENGAD Bayonne, N.J.

APPENDIX M

EXECUTED HUNTINGTON NATIONAL BANK ENGAGEMENT LETTER

THE HUNTINGTON COMPANY

SECURITIES ♦ INVESTMENT BANKING

November 8, 1988

Mr. Howard Shanker
Human Services Plaza Limited Partnership
c/o Shanker International, Inc.
1640 Superior Avenue
Cleveland, OH 44114

Mr. David D. Owen
Human Services Plaza Limited Partnership
c/o David D. Owen Associates
1127 Euclid Avenue
Cleveland, Ohio 44115

RE: $23,500,000.00 Human Services Plaza _____%
Multi-Option First Mortgage Notes due January 1, 2012

Gentlemen:

We are very pleased that you have decided to retain the Corporate Finance Department of The Huntington Company ("Corporate Finance") to assist you as your exclusive Financial Advisor and Agent in the structuring, negotiation and private placement of the above-referenced Notes. In this role, we would

provide general investment banking assistance including, but not limited to, development of the basic financing structure, negotiation of the general terms and conditions of the Notes with prospective Note purchasers, identification of prospective purchasers of the Notes, and coordination of the closing process to facilitate a successful and timely closing.

A fee equal to 1/25% of the principal amount of the Notes, plus direct out-of-pocket expenses, will be due Corporate Finance upon the closing of this contemplated transaction. In addition, you agree to pay the mutually agreed upon professional fees and out-of-pocket expenses of the various legal counsels, trustee and other financial participants. An initial listing of these participants is attached as Exhibit A. Corporate Finance intends to assist you in the sale of these Notes on a best-efforts, limited distribution basis to qualified investors only.

A Preliminary Summary of Proposed General Terms is attached as Exhibit B. Corporate Finance intends to contact select qualified investors to determine their respective level of interest in the Notes. The final terms and conditions of the Notes may vary from this preliminary summary, subject to negotiation and acceptance by you and all other parties to the transaction.

If you are in agreement with the terms and conditions of this letter, the Preliminary Summary of the Proposed General Terms and the general fees listed on Exhibit A, please so indicate by signing both copies of this letter and returning one of them to my attention.

Please call me if you have any questions regarding this letter, Exhibit A or Exhibit B. We look forward to working closely with you on this important financing.

Sincerely,

/s/
Thomas L. Whitman
Manager, Private Placements
Corporate Finance

ACKNOWLEDGED, AGREED
AND ACCEPTED:
HUMAN SERVICES PLAZA
LIMITED PARTNERSHIP

By: /s/
Howard Shanker, General Partner

By: /s/
David D. Owen, General Partner

EXHIBIT A

ESTIMATED ISSUANCE FEES - SELECTED TRANSACTION PARTICIPANTS

Participants	Role	Professional Fee
The Huntington Company	Financial Advisor/Agent	$275,000
NA	Bond Counsel/Agent Counsel	30,000
Porter, Wright, Morris, & Arthur	Letter of Credit Bank Counsel	15,000
NA	Purchaser	10,000
NA	Counsel	10,000
The Central Trust Company, N.A.	Borrower Counsel Trustee	7,500

In addition, the Borrower will be responsible for the direct out-of-pocket expenses of each of the Participants and The Huntington Mortgage Company and The Huntington National Bank as the Letter of Credit provider.

The above listed fees relate directly to the Note transaction only and do not include the customary real estate related expenses, such as appraisal, title insurance, inspection fees, hazard insurance, architects review fees, etc.

APPENDIX N

HUNTINGTON NATIONAL BANK'S TRANSACTION TIMETABLE

The Huntington National Bank
P.O. Box 1558
Columbus, Ohio 43216

November 28, 1988

TO: Transaction Participants

FROM: Tom Whitman

RE: $23,500,000 Human Services Plaza ____%
Multi-Option Adjustable Rate Notes due January 1, 2004

Gentlemen:

Please find enclosed a Distribution List and Transaction Schedule for the above-referenced financing. Please note that I have scheduled a document review session for December 8 at 10:00 a.m. to be held at Baker & Hostetler in Cleveland. Out of town participants will be connected by conference call.

Please call me immediately should you have a conflict with this schedule. I look forward to working closely with each of you on this transaction.

Thank you for your cooperation.

TRANSACTION TEAM

Mr. Howard Shanker
c/o Shanker International, Inc.
1640 Superior Avenue
Cleveland, Ohio 44114
(216) 241-1700

Mr. David D. Owen
c/o David D. Owen Associates
1127 Euclid Avenue
Cleveland, Ohio 44115
(216)

Mr. Anthony Caruso
The Huntington Mortgage Company
917 Euclid Avenue
Cleveland, Ohio 44115
(216) 344-6771

Mr. William H. Bresch
Corporate Trust Department
The Central Trust Company, N.A.
Fifth and Main Streets
Cincinnati, Ohio 45202
(513) 651-8386

Mr. Thomas L. Whitman
Corporate Finance Department
The Huntington National Bank
41 South High Street-HC0930
Columbus, Ohio 43215
(614) 463-4521

Edward G. Ptaszek, Esq.
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Thomas C. Coady, Esq.
Nancy B. Young, Esq.
Porter, Wright, Morris & Arthur
41 South High Street - 28th Floor
Columbus, Ohio 43215
(614)227-2000

$23,500,000 Human Services Plaza _____%
Multi-Option Adjustable Rate Note due January 1, 2004

TRANSACTION TIMETABLE

DATE	ACTIVITY	RESPONSIBLE PARTY
November 23	■ Company Provides HNB with mandate to proceed on Multi-Option Notes transaction.	HSP
	■ HNB to assemble financing participants.	HNB
November 25	■ Transaction Schedule/Distribution List sent out.	HNB
November 28	■ Documentation process started	BH/PWMA
	■ Letter of Credit request form completed.	HMC
December 1	■ Request for Letter of Credit submitted by HMC.	HMC
	■ Summary of Proposed Terms distributed	HNB

December 2	■ First drafts of Trust Indenture, Placement Agent Agreement, Remarketing Agent Agreement and Preliminary Private Placement Memorandum ("Basic Documents") delivered.	BH
December 5	■ First drafts of Reimbursement Agreement, Letter of Credit and mortgage documents delivered ("LC Documents").	PWMA
December 8	■ Document review session scheduled for 10:00 a.m. in Cleveland.	ALL

December 13	■ Second drafts of Basic and LC documents delivered.	BH/PWMA
	■ Progress report on real estate related matters.	HSP
	■ Preliminary Private Placement Memorandum circulated.	HNB
	■ CUSIP number requested.	HNB
	■ LC number requested.	HMC
December 16	■ Final comments due on all documents.	ALL
	■ Initial interest rate determined.	HNB
	■ Final closing date established.	HNB/HSP
December 20	■ Change pages distributed.	BH/PWMA
December 22	■ Pre-closing to be held in Cleveland.	ALL
December 23	■ Closing at 9:00 a.m.	TRUSTEE/ PURCHASER

LEGEND:

HSP	Human Services Partnership (Borrower)
HNB	Huntington National Bank (Placement Agent)
BH	Baker & Hostetler (Bond Counsel)
PWMA	Porter, Wright, Morris & Arthur (LC Counsel)
HMC	Huntington Mortgage Company (Letter of Credit Bank)

Others:	Borrower Counsel
	Trustee
	Purchaser
	Cuyahoga County

APPENDIX O

Commercial Loan Facility Request

101076

COMMERCIAL LOAN FACILITY REQUEST • 1 of 1

BORROWER NAME Human Services Plaza Partnership, an Ohio general partnership
ADDRESS c/o DIVCO, Inc., 1127 Euclid Avenue, Cleveland, Ohio 44115
TAX ID # 34-1593168 ACLS # N/A TOTAL AGGREGATE EXPOSURE $23,500,000.00
RELATIONSHIP BANKER Anthony R. Caruso DIV./BANKING OFC. Commercial Real Estate (CM17)

( ) New Bus. (X) New Exist ( ) Line Adv. Exist Doc. ( ) Renewal ( ) Renewal/ Increase ( ) Renewal Decrease ( ) Restructure ( ) Renegotiated Yield % +/- Target Yield %

Amount Requested	Loan Type	Rate	Fees	Maturity	Quality / Risk Rating	Required Balances
$23,500,000.00	Letter of Credit	P + 1%	1% annually	78 months	3H	None

PURPOSE OF CREDIT

This Standby Letter of Credit will be used to support the placement of 78-month, 7-day adjustable rate "Grantor Trust" Certificates to be sold by the Corporate Finance Dept. - Tom Whitman.

TERMS OF REPAYMENT

If renewal under terms different than original explain fully.

PRIMARY AND SECONDARY SOURCES OF REPAYMENT

Rent income from a five-year lease from the County of Cuyahoga, Ohio, payable at $244,536 monthly for 60 months beginning 07/01/90 with an option to purchase the real estate or to extend the lease for an additional five years.

COLLATERAL

Collateral Description	Market Value	Encumbrances Prior Liens, Etc.	Market Value Net Of Encumb.	Loan to Value (%)	Valuation Date	Valuation Method
Five-story office building on a 1.25 acre parcel - "Human Services Plaza"	$30,000,000	None	$30,000,000	78.3%	12/88	MAI Appraisal

GUARANTORS

Name	% Guarantee	Security	Statement Date	Net Worth	Outside Net Worth	Liquid Assets	Prepared By
Howard H. and Carol B. Shanker	100%		12/6/88	$3,368,000	$ 568,000	$ 20,000	HHS
David D. and Marilyn Owen	100%		11/15/88	$1,745,086	$1,295,086	$ 147,387	DDO

COVENANTS, CONDITIONS, LOAN AGREEMENTS

1. Assignment of First Mortgage Bond Documents and direct Assignment of Lease.
2. Fully-bonded construction contract from Turner Construction Company.
3. Additional requirement of $200,000.00 to be contributed to "Sinking Fund Reserve" to be released for increased interest payments or applied to principal reduction if lease is

PLAINTIFF'S EXHIBIT 10 12/20/90 13995 50

CREDIT POLICY EXCEPTIONS

3. (cont'd) is not extended for the second 5 year period. Sinking fund requirement is 50% of cash flow after debt service but not less than $200,000 yearly.
4. Hiring or a construction manager acceptable to HNB.

COMMENTS

Bond proceeds will be used to repay existing $825,000.00 mortgage loan held by HNB as Commercial Loan Account No. 8668112484, Note No. 21762300.

SUBJECT TO Selling $15,500,000 Pmt. in the L.C.

REQUIRED SUPPORTING INFORMATION

COMMERCIAL LENDING DOCUMENTATION

- Agr-Goods, Prod. & Live St.—E
- Assignment Note/Lease—F
- Bonds & Debentures—C
- Consumer Purpose—A
- Cons. Borrowing Documents—A
- Futures—B
- Guaranty: Cons. ____ Part. ____ Pers. ____—A
- Life Insurance—A
- Machinery, Equip., Fixtures—B
- Personal Residential Note—A
- Primary Borrowing Documents—A
- RE Construction Loan—D
- RE Commercial Mortgage Loan—D
- RE Personal Mortgage Loan—E
- Receivables/Inventory—B
- Savings Assignment—C
- Stock, LLC—F
- Stock—C
- Time Certificates—C
- Vehicle/Rolling Stock—B
- Other

SPECIAL INSTRUCTIONS

- XX All Documents Attorney prepared
- Hazardous Waste Opinion
- Legal Opinion/Review
- Loan Agreement
- Reg AA
- Reg O
- Subordinate Agreement
- Other

APPROVALS

OFFICER	SIGNATURE	DATE
Account Officer	Anthony R. Caruso	12/06/88
Supervisor	Roger Buxton	
Manager	George E. Emmons	
Other		
Other		12/12/88
Exec. Asst.		

DISBURSEMENTS

Order to Disburse Proceeds form, signed by customer. Total required for disbursement to other than borrower(s).	

COMMITTEE ACTION

Regional/Affiliate	Senior
( ) Appr. ( ) Approve ( ) Decl. ( ) Ratified ( ) Tabled ( ) Refer to Senior	( ) Appr. ( ) Approve ( ) Decl. ( ) Ratified ( ) Tabled ( ) Rec. to Bd. of Dir. ( ) Appr. Bd. of Dir.
Secretary:	Secretary:

White: Credit File Retain 7 yrs. after expiration. Canary: Attach to note until paid then return. Pink: Forward immediately after closing to Regional Credit Administrator

BORROWER NAME Human Services Plaza Partnership DATE 12/06/88

SUMMARY OF BORROWER

BUSINESS BACKGROUND AND MANAGEMENT: The borrowing entity is a general partnership established for this project. Its principals are Howard Shanker and David D. Oven. Shanker is in the wholesale promotional/premium business and controls the site. Oven is an experienced construction manager/developer who brings the needed construction expertise and administration ability to the project.

STATUS OF EXISTING CONSTRUCTION LOANS:

PROJECT	OUTSTANDING BALANCE	REMAINING TO BE DISBURSED	TOTAL % COMPLETED	ESTIMATED PAYOFF DATE

OTHER BANKS:

PROJECT DESCRIPTION

A five-story office building to be constructed on a 1.25 acre site at 1650 Superior Avenue, Cleveland, Ohio. Construction management is to be under a bonded contract with Turner Construction Company. The building will be occupied by Human Services, Welfare, Child Support Agencies of Cuyahoga County on a "build to suit" basis.

SURROUNDING AREA: IMPROVING (X) STATIC ( ) DECLINING ( )

The surrounding area is typically low-rise industrial warehouse users. Site is a designated "Urban Renewal Area". Directly opposite is the new Cleveland Fire Department Headquarters & Administration Building (1984). Cuyahoga County is reputed to be considering relocation of other departments to nearby sites in either exiscing buildings or to-be-built structures.

GENERAL REMARKS:

PROJECT ECONOMICS

COMMENTS

*Calculated at 9%, 30-year amortization plus 1% letter of credit fee.

COST ANALYSIS		PER SF
LAND	$ 2,100,000	$ 8.28
HARD COSTS	16,237,013	64.07
SOFT COSTS	2,363,821	9.32
TENANT IMPROVEMENTS		
INTEREST RESERVE	1,822,500	7.19
OPERATING DEFICITS		
FF & E		
OTHER Leasing Commission	400,000	1.57
OTHER Developer's Fee	4,500,000	17.75
CONTINGENCIES	576,666	2.27
TOTAL COSTS	$28,000,000	
SOURCE OF FUNDS ANALYSIS		
HNS UDAG LETTER OF CREDIT	$23,500,000	92.73
EQUITY Developer's Fee	4,500,000	17.76
TOTAL FUNDS	$28,000,000	110.49
INCOME-DEBT SERVICE ANALYSIS		
GROSS INCOME	$ 2,934,430	11.57
TOTAL	$ 2,934,430	11.57
LESS VACANCY (___%)	(-0-)	
EFFECTIVE GROSS INCOME	$2,934,430	
LESS EXPENSES	( )	
Insurance	28,000	.11
Structural Reserve	12,430	.04
NET INCOME	$2,894,000	11.42

DEBT SERVICE $ 2,505,100.00 ASSUMING A $ 23,500,000.00 MORTGAGE

INTEREST RATE 10.65% AMORTIZATION 30 YEARS

DEBT SERVICE COVERAGE 1.15 BREAK-EVEN PERCENTAGE 86.7% PRE-LEASING PERCENTAGE 100%

VALUATION

APPRAISAL: VALUE $30,000,000.00 AS OF 12/88 METHOD MAI

APPRAISER: Anthony J. Calabrese, MAI of CRM, Inc.

HUNTINGTON: VALUE $30,000,000.00 CAPITALIZATION RATE 10.63% (11.00% Discount)

LOAN TO VALUE-APPRAISER 78.3% LOAN TO VALUE-HUNTINGTON 78.3%

Attach to Mortgage Loan Facility Request and place in credit file

HUMAN SERVICES PLAZA PARTNERSHIP

The proposed transaction anticipates the issuance of a Huntington letter of credit to enhance the placement of a private bond transaction which has been sold throught Tom Whitman of the Commercial Finance Department of the bank.

Cuyahoga County, Ohio currently uses an older building at West 3rd and St. Clair for its Welfare Department operations. It has been in this building under 5 year renewable leases for 28 years. However, this building will be razed to provide for the expansion of the County Justice & Jail facility. The county is under federal citation to expand the jail to relieve over-crowding conditions that violate current federal regulations.

The county believes that the proposed lease transaction is the most expeditious method of meeting the deadlines imposed by the federal goverment to alleviate the jail problem. As such, several proposals from various developers were reviewed and this group was selected.

Cuyahoga County is also looking at other sites within this area to expand its administration offices which are also over-crowded and in-efficient. This will enhance the potential of a complete county facility for all areas except the jail to be located in this neighborhood.

In a direct discussion with Jack Furlong, Real Estate Adminstrator for the county, he related that he strongly supports the purchase by the county of this building at the earliest possible opportunity. Under the terms of the lease, this would be after the 60 month of the lease.

In addition to the lease commitment, the county has also invested in a new telephone system for this location since the existing system must be used until relocation is complete. Further, the county will install 700 computer terminals and 120 printers, together with the needed wiring and HVAC needs to support this equipment, in this building at its own cost.

Further, the county will pay an additional $5,000,000 for special tenant improvements from a separate budget in order to get the special needs of its staff in the building. This will include a courtroom facility on the upper level with provision for a judge, bailiff, 6 - 8 prosecutors and other staff.

The county will also tie-in to the federal system of welfare identification based on client fingerprints known as the CRIS-E system in order to reduce the potential of recipients getting benefits from more than a single jurisdiction.

All of the above information, with emphasis on the county's desire to purchase the building, would indicate that the risk entailed in a relatively short-term lease of the building has been off-set. The lease document does provide for the purchase of the building within 5 years or at the end of 10 years at the then current Fair Market Value of the building and assuming rents at a level not less than the then current rental requirements of the county lease.

APPENDIX P

EXCERPTS FROM DRAFT TRUST INDENTURE

TRUST INDENTURE

THIS TRUST INDENTURE (the "Indenture") dated as of December _____, by and between Human Services Plaza Partnership, a partnership (the "Company"), and The Central Trust Company, N.A., a national banking association duly authorized to exercise corporate trust powers, as Trustee under the circumstances summarized in the following recitals (the "Trustee") (the capitalized terms not defined in the recitals and granting clauses being used therein as defined in Article I hereof):

A. For its lawful purposes, the Company has authorized the issue and sale of its Multi-Option Adjustable Rate Notes Due January 1, 2004 (the "Project Notes"), in the aggregate principal amount of $23,500,000 to the original purchasers thereof pursuant to the Placement Agreement, as defined herein, the execution and delivery of this indenture and the granting of security for the Project Notes;

B. All acts and conditions required to happen, exist and be performed precedent to and in the issuance of the Project Notes and the execution and delivery of this Indenture have happened, exist and have been performed, or at the delivery of the Project Notes will exist, will have happened and will have been performed (i) to make the Project Notes, when issued,

delivered and authenticated, valid obligations of the company in accordance with the terms hereof, and (ii) to make this Indenture a valid, binding and legal trust agreement for the security of the Notes in accordance with its terms; and

C. The Trustee has accepted the trusts created by this Indenture, and in evidence thereof has joined in the execution hereof;

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in order to declare the terms and conditions upon which the Notes are, and are to be, authenticated, issued and delivered, and in consideration of the promises, of the purchase and acceptance of the Notes by the Holders. thereof and Of the sum of one dollar duly paid to it by the Trustee at the execution of these presents, the receipt whereof is hereby acknowledged the Company covenants and agrees with the Trustee for the equal and proportionate benefit of the respective Holders from time to time of the Notes, as follows:

unmatured and unredeemed portion of, and bearing interest at the same rate and maturing on the same date as, the Note surrendered. Notwithstanding anything in this Section to the contrary, any Notes which are Pledged Notes (as defined in the

Reimbursement Agreement), shall be selected for redemption pursuant to this Section prior to the selection of any other Notes.

SECTION 5.03. Company's election to Redeem. Except in the case of redemption pursuant to any mandatory sinking fund requirements or pursuant to other mandatory redemption provisions hereof, Notes shall be redeemed only by written notice from the Company to the Trustee and the Bank. That notice shall specify the redemption date and the principal amount of each maturity of Notes to be redeemed, and shall be given at least 45 days prior to the redemption date or such shorter period as shall be acceptable to the Trustee. Except with the prior written consent of the Bank, in the case of any optional redemption of Notes pursuant to Section 5.01(c) or (d) hereof, there shall be deposited with the Trustee concurrently with the notice specified in the immediately preceding sentence funds which, in addition to any other moneys available therefor and held by the Trustee, will be sufficient to redeem at the redemption price thereof, plus interest accrued to the redemption date, all of the redeemed Notes for which notice of redemption is to be given.

SECTION 5.04. Notice of Redemption. Unless waived by any Holder of Notes to be redeemed, official notice of any such redemption shall be given by the Trustee on behalf of the Company by mailing a copy of an official redemption notice by registered or certified mail at least 30 days and not more than 60 days prior to the date fixed for redemption to the registered

Holder of the Note or Notes to be redeemed at the address shown on the Register or at such other address as is furnished in writing by such registered Holder to the Trustee.

All official notices of redemption shall be dated and shall state:

(a) the redemption date,

(b) the redemption price,

(c) if less than all outstanding Notes are to be redeemed, the identification by designation letters, numbers or other distinguishing marks (and, in the case of partial redemption, the respective principal amounts) of the Notes to be redeemed,

(d) that on the redemption date the redemption price will become due and payable upon each such Note or portion thereof called for redemption, and that interest thereon shall cease to accrue from and after said date, and

(e) the place where such Notes are to be surrendered for payment of the redemption price, which place of payment shall be the principal corporate trust office of the Trustee.

Prior to any redemption date, the Company shall deposit with the Trustee an amount of money sufficient to pay the redemption price of all the Notes or portions of Notes which are to be. redeemed on that date.

Official notice of redemption having been given as aforesaid, the Notes or portions of Notes so to be redeemed shall, on the redemption date, become due and payable at the redemption price therein specified, and from and after such date (unless the Company shall default in the payment of the redemption price) such Notes or portions Of Notes shall cease to bear interest. Upon surrender of such Notes for redemption in .accordance with said notice, such Notes shall be pa d by the Trustee at the redemption price. Installments of interest due on or prior to the redemption date shall be payable as herein provided for payment of interest. Upon surrender for any partial redemption of any Note, there shall be prepared for the registered Holder a new Note or Notes of the same maturity in the amount of the unpaid principal. All Notes which have b redeemed shall be cancelled and destroyed by the Registrar and shall not be reissued, subject to the provisions of Section 3.06 hereof.

In addition to the foregoing notice, further,notice shall be given by the Trustee as set out below, but no defect in said further notice nor any failure to give all or any portion of such further notice shall in any manner defeat the effectiveness of a call for redemption if notice thereof is given at above proscribed:

(a) Each further notice of redemption given hereunder shall contain the information requited above for an official notice of redemption plus (i). the CUSIP numbers of all Notes being redeemed; (ii) the date of issue of the Notes as originally issued; (iii) the rate of interest borne by each Note being redeemed; (iv) the maturity date of each Note being redeemed; and (v) any other descriptive information needed to identify accurately the Notes being redeemed.

(b) Each further notice of redemption shall be sent at least 30 days before the redemption date by registered or certified mail or overnight delivery service to all registered securities depositories then in the business of holding substantial amounts of obligations of types comprising the Notes (such depositories now being Depository Trust Company of New York, New York, Midwest Securities Trust Company of Chicago, Illinois, Pacific Securities Depository Trust Company of San Francisco, California and Philadelphia Depository Trust Company of Philadelphia, Pennsylvania) and to one or more national information services that disseminate notices of redemption of obligations such as the Notes.

(c) Each such further notice shall be published one time in the Bond Buyer of New York, New York or, in some other financial newspaper or journal which regularly carries notices of redemption of other obligations similar to the Notes, such publication to be

made at least 30 days prior to the date fixed for redemption.

(d) Upon the payment of the redemption price of Notes being redeemed, each check or other transfer of funds issued for such purpose shall bear the CUSIP number (if any) identifying, by maturity, the Notes being redeemed with the proceeds of such check or other transfer.

Failure to receive notice by mailing or any defect in that notice regarding any Note, however, shall not affect the validity of the proceedings for the redemption of any Note.

SECTION 5.05. Payment of Redeemed Notes. Notice having been mailed to the registered Holder of the Note or Notes to be redeemed in the manner provided in Section 5.04 hereof, and, in the event of optional redemption pursuant to Section 5.01(c) or (d) hereof, upon money being deposited as and if required by Section 5.03 hereof, the Notes and portions therefor called for redemption shall become due and payable on the redemption date, and upon presentation and surrender thereof at the place or places specified in that notice, shall be paid at the redemption price, including interest accrued to the redemption date. The Trustee shall make a drawing under the Letters of Credit to effect any such redemption. Any moneys received by the Trustee from the Company which are to be applied toward the redemption of Notes, shall be paid to the Bank to reimburse

the Bank for any drawing made under such Letters of credit to effect such redemption.

If money for the redemption of all of the Notes and portions thereof to be redeemed, together with interest accrued thereon to the redemption date, is held by the Trustee or any, Paying Agent on the redemption date, so as to be available therefor on that date and if notice of redemption has been deposited in the mail to the registered Holder of the Note or Notes to be redeemed as aforesaid, then from and after tie redemption date those Notes and portions thereof called for redemption shall cease to bear interest and no longer shall be considered to be outstanding hereunder. If those moneys shall not be so available on the redemption date, or that notice shall

Paying Agents or Authenticating Agents and of all other amounts required to be paid under this indenture, the Reimbursement Agreement and the Notes, shall be paid to the Company or the Bank as provided in Section 10.04 hereof to the extent that those amounts are in excess of those necessary to effect the payment and discharge of the outstanding Notes.

SECTION 6.10. Expiration of Letter of Credit; Alternate Letter of Credit. The Letter of Credit shall expire upon the earliest to occur of (i) the Trustee Is making of the final drawing available to be made thereunder, (ii) receipt by the Bank of a

certificate of the Trustee stating that no Project Notes are outstanding under the Indenture, (iii) receipt by the Bank of a certificate of the Trustee stating that an Alternate Letter of Credit has been accepted by the Trustee or (iv) January 15, 1994.

The Company may provide for the delivery to the Trustee of an Alternate Letter of Credit having a term expiring no sooner than January 15, (1995.) Prior to the replacement of a Letter of Credit with an Alternate Letter of Credit, the following conditions shall have been met: (i) the Trustee shall have received from the Company written notice of such replacement, including notice of the form of Alternate Letter of Credit and the issuer thereof, together with evidence of the obligation of such issuer to timely deliver the Alternate Letter of Credit, an opinion of counsel for the issuer of the Alternate Letter of Credit that it constitutes a legal, valid and binding obligation of the issuer in accordance with its terms and that payments thereunder will not constitute voidable preferences; and (iii) the bank issuing the Alternate Letter of Credit (or the holding company parent of the issuer) has unsecured, uninsured and unguaranteed long-term debt rated by a Rating service in one of its three highest rating categories.

ARTICLE VII

THE TRUSTEE, REGISTRAR, PAYING AGENT AUTHENTICATING AGENT AND REMARKETING AGENT

SECTION 7. 01. Trustee's Acceptance, and Responsibilities. The Trustee accepts the trusts imposed upon it by this Indenture, and agrees to observe and perform those trusts, but only upon and subject to the terms and conditions set forth in this Article, to all of which the parties hereto and the Holders agree:

(a) Prior to the occurrence of a default or an Event of Default (as defined in Section 8.01 hereof) of which the Trustee has been notified, as provided in paragraph (f) of Section 7.02 hereof, or of which by that paragraph the

*** Exhibit A - Page 1***

[Legend]
[Form of Note]

HUMAN SERVICES PLAZA PARTNERSHIP
Multi-Option Adjustable Rate Notes
Due January 1, 2004

No._____ $_____

HUMAN SERVICES PLAZA PARTNERSHIP, a partnership duly organized and existing under the laws of the State of _____ (the "Company"), for value received, hereby promises to pay to _____ or registered assigns, on January 1, 2004 (unless this Note is called for earlier redemption), the principal sum of _____ Dollars ($____) and to pay interest thereon from the date of original issuance of this Note to and including the date next preceding _____, 1988, at a rate fixed in a certificate of the Remarketing Agent (as defined in the Indenture hereinafter defined) as of or prior to the initial delivery of the Note, and, thereafter, from and including each Interest Payment Date (as hereinafter defined) to and including the day preceding each succeeding Interest Payment Date, at the interest rate determined by the Remarketing Agent (as defined in the Indenture) in the Interest Rate Mode (as hereinafter defined) selected by the Company pursuant to Section 2.02 of the Indenture. Interest will be payable on the first day of each month (the "Interest Payment Dates").

If any Interest Payment Date, date of maturity of this Note, or date fixed for redemption of this Note, is not a Business Day (as hereinafter defined), then payment of such principal hereof or interest or premium hereon may be made on the next succeeding Business Day with the game force and effect as if such payment were made on such Interest Payment Date, date of maturity or date of redemption and no interest shall accrue hereon for such period after such Interest Payment Date, date of maturity or date fixed for redemption.

The principal of, and premium, if any, on this Note is payable upon presentation and surrender hereof at the principal corporate trust office of the Trustee, presently The Central Trust Company, N.A., Cincinnati, Ohio (the "Trustee"). Interest is payable on each interest Payment Date by check or draft mailed to the person in whose name this Note (or one or more predecessor Notes) is registered (the "Holder") at the close of business on

Credit"), pursuant to which the Trustee is entitled to draw up to (a) the principal amount of the Notes outstanding to enable the Trustee to pay the principal amount of the Notes when due At maturity or upon redemption or acceleration on the occurrence of an event of default, and an amount equal to the principal portion of the purchase price of any Notes duly tendered by the Holders thereof for purchase pursuant to the Indenture, plus (b) the amount of interest accruing on the Notes, but not to exceed 45 days' maximum accrued interest computed at the rate of [l2%] per annum, to enable the Trustee to(lay interest when due on the Notes and the interest portion f any) of the purchase price of any Notes duly tendered by the Holders thereof for purchase pursuant to the Indenture. Pursuant to the Reimbursement Agreement the Company is obligated to reimburse the Bank for all drawings made under the Letter of Credit. The Letter of Credit shall expire, subject to provisions for earlier termination, on January 15, 1994.

Subject to the provisions of the Indenture and the Reimbursement Agreement, the Letter of Credit may be replaced from time to time by another letter of credit (an "Alternate Letter of Credit"), in which case the term "Bank" shall mean the financial institution issuing the Alternate Letter of Credit and the term "Letter of Credit" shall mean the Alternate Letter of Credit.

Copies of the Indenture, the Letter of Credit and the Reimbursement Agreement are on file in the principal corporate trust office of the Trustee.

The Notes are issuable only as fully registered notes in denominations of $5,000 and any integral multiple thereof and are exchangeable for Notes of other authorized denominations in equal aggregate principal amounts at the office of the Registrar, originally the Trustee, but only in the manner and subject to the limitations provided in the Indenture. This Note is transferable at the office of the Registrar, by the Holder in person or by his attorney, duly authorized in writing, upon presentation and surrender hereof to the Registrar. The Registrar is not required to transfer or exchange (i) any Note during a period beginning at the opening of business 15 days before the day of the mailing of a notice of redemption of Notes and ending at the close of business on the day of such mailing, or (ii) any Notes so selected for redemption in whole or in part.

The Indenture permits certain amendments or supplements to the Indenture not prejudicial to the Holders to be made with the consent of the Bank but without the consent of or

notice to the Holders, and other amendments or supplements thereto to be made with the consent of the Bank and the Holders of not less than a majority in aggregate principal amount of the Notes then outstanding.

APPENDIX Q

Letter of Credit

LETTER OF CREDIT

Irrevocable
Letter of Credit No.___
Dated as of___, 19_

The Central Trust Company, N.A., as Trustee
201 East Fifth Street
Cincinnati, Ohio 45202

Attention: Corporate Trust Department

Ladies and Gentlemen:

The Huntington National Bank (sometimes hereinafter referred to as the "Bank") hereby establishes in your favor for the account of Human Services Plaza Partnership an Ohio general partnership formed and existing under the laws of the State of Ohio (the "Company"), its Irrevocable Letter of Credit No. (this "Letter of Credit") in a maximum amount of up to $23,852,500 (as more fully described below) effective immediately and expiring at 5:00 P.M., Cleveland, Ohio time, on _, 19 __ (the "Expiration Date"), unless terminated earlier in accordance with the provisions hereof.

This Letter of Credit is being issued in connection with that certain Trust Indenture (the "Trust Indenture") between the Company and you dated as of ___, 19__ pursuant to which the Company has authorized and issued its Multi-option Adjustable Rate Notes, due January 1, 2004 (the "Notes"), in the aggregate principal amount of $23,500,000, the payment of which is secured by, among other things, this Letter of Credit. All capitalized terms used but not -defined herein
shall have the meanings ascribed thereto in the Trust Indenture.

As used in this Letter of Credit, the term "business day" shall mean any day of the year, other than (i) a Saturday or a Sunday, (ii) any day on which banks located in either Cleveland, Ohio or the city in which the principal corporate trust office of the Trustee pursuant to the Trust Indenture is located are required or authorized by law to remain closed, or (iii) any day on which The New York Stock Exchange is closed.

You, as Trustee pursuant to the Trust Indenture, are hereby irrevocably authorized to draw on us, for the account of the Company, in accordance with the terms and conditions hereof and subject to increases and reductions in amounts as hereinafter set forth, an aggregate amount not exceeding Twenty-Three Million Eight Hundred Fifty-Two Thousand Five Hundred Dollars ($23,852,500.00) (the "Stated Amount"), of which (A) an aggregate amount not exceeding $23,500,000 may be drawn upon for payment of (i) the unpaid principal amount of the Notes ("Principal Drawing"), and/or (ii) for payment of that portion of

the purchase price of the Notes corresponding to the principal thereof when delivered to the Trustee in accordance with the provisions of the Trust Indenture and the Notes and which, together with any interest portion of such purchase price payable on such Notes pursuant to the provisions of the Trust Indenture and Notes comprises a Remarketing Drawing ("Remarketing Drawing"), and (B) an aggregate amount not exceeding $352,500 may be drawn upon for payment of (i) up to 45 days' accrued interest on the Notes at a maximum interest rate of 12% per annum ("Interest Drawing") and/or (ii) for the payment of that portion of a Remarketing Drawing corresponding to the interest portion thereof. All drawings under this Letter of Credit will be paid with our own funds.

Funds under this Letter of Credit are only available to you against your sight draft(s) drawn on us, substantially in the form of Exhibit 1 hereto, stating on their face: "Drawn under The Huntington National Bank Letter of Credit No.____" and upon your presenting to us of one or more of the following written certificates:

(A) If the drawing is being made for payment of principal of the Notes whether due upon maturity, redemption or acceleration, a written certificate signed by you in the form of Exhibit 2 attached hereto appropriately completed (a "Principal Drawing");

(B) If the drawing is being made for the payment of the purchase price of the Notes delivered to the Trustee in

accordance with the provisions of the Trust Indenture and Notes, a written certificate signed by you in the form of Exhibit 3 attached hereto appropriately completed (a "Remarketing Drawing"); and

(C) If the drawing is being made for a payment of interest on the Notes, a written certificate signed by you in the form of Exhibit 4 attached hereto appropriately completed (an "Interest Drawing").

Presentation of such draft(s) and certificate(s) shall be made on a business day at our office located at 917 Euclid Avenue, Cleveland, Ohio 44115 (Attention: International operations) or any other place in the State of Ohio which may be designated by us by written notice delivered to you. If we receive any of your drafts drawn hereunder at such office, all in strict conformity with the terms and conditions of this Letter of Credit, on or prior to the termination hereof, we will honor the same and make payment hereunder. If a draft and certificate are presented to us as aforesaid by 11:00 A.M., Cleveland, Ohio time, payment will be made, in immediately available funds, by 11:00 A.M., Cleveland, Ohio time, on the next business day following presentment, otherwise, payment will be made, in immediately available funds, by 11:00 A.M., Cleveland, Ohio time, on the second business day following presentment. If requested by you, payment may be made by deposit of such funds into a designated bank account that you maintain.

Upon payment of a drawing hereunder, the Stated

Amount of this Letter of Credit shall be reduced by the amount of such payment except as follows:

(A) In connection with any Remarketing Drawing (i) upon receipt by the Trustee on our behalf of all remarketing proceeds thereof (in an amount equal to at least 98% of the principal portion of such Remarketing Drawing) or, to the extent so unpaid, receipt by the Trustee for our benefit of Notes in the aggregate principal amount equal to the unpaid amount of the principal portion of such Remarketing Drawing delivered by you or on your behalf, registered in the name of the Company as pledgor and our name as pledgee, your right to draw on us by a Remarketing Drawing shall automatically be reinstated in an amount equal to the principal portion of such Remarketing Drawing, and (ii) if you have not received from us within ten (10) business days from the date of your drawing a notice from us in the form of the certificate attached hereto as Exhibit 5 appropriately completed, indicating that we have not reinstated the Letter of Credit for all amounts drawn under such Remarketing Drawing representing the interest portion of the amount of such Remarketing Drawing, your right to draw on us by a Remarketing Drawing shall be automatically reinstated in the amount of the interest portion of such Remarketing Drawing and this automatic reinstatement of your right to make a Remarketing Drawing shall be applicable to successive Remarketing Drawings so long as this Letter of Credit shall have not terminated as set forth below.

(B) In connection with any Interest Drawing, if you have not received from us within ten (10) business days from the date of your drawing a notice from us in the form of the certificate attached hereto as Exhibit 6 appropriately completed, indicating we have not reinstated the Letter of Credit for all amounts drawn under such Interest Drawing, your right to draw on us by an Interest Drawing shall be automatically reinstated in the amount of such Interest Drawing and this automatic reinstatement of your right to make an Interest Drawing shall be applicable to successive Interest Drawings so long as this Letter of Credit shall have not terminated as set forth below.

Only you, as Trustee, or your transferee pursuant to the terms of this Letter of Credit, may make a drawing under this Letter of Credit. Upon the payment to you, as Trustee, of the amount specified in a draft drawn hereunder, we will be fully discharged of our obligation under this Letter of Credit with respect to such draft and shall not thereafter be obligated to make any further payments under this Letter of Credit in respect of such draft to you or any other person who may have made to you or makes to you a demand for payment of principal of, purchase price of, premium, or interest on the Notes. By paying to you an amount demanded in such draft we make no representation as to the correctness of the amount demanded in such draft. We shall have no obligation, pursuant to this Letter of Credit or otherwise, to determine whether any drawing is being properly made pursuant to the terms of the Trust Indenture, the Notes or any other instrument or agreement, or to determine the correctness of the amount of any such drawing, our sole obligation being to

determine that the sight drafts and certificates provided for in this Letter of Credit appear on their face to be in accordance with the terms and conditions of this Letter of Credit.

This Letter of Credit applies only to the payment of principal (or that portion of the purchase price corresponding to principal) of the Notes, and up to 45 days' interest (or that portion of the purchase price corresponding to interest) accruing on the Notes at a maximum interest rate of 12% per annum, on or prior to the expiration of this Letter of Credit and does not apply to any interest that may accrue thereon or any principal or purchase price which may be payable with respect thereto after such date.

Upon the earliest of (i) the making by you of the final drawing available to be made hereunder, (ii) our receipt of a written certificate signed by your officer and a general partner of the Company in the form of Exhibit 7 attached hereto appropriately completed, stating that: (a) no Note is outstanding within the meaning of the Trust Indenture and (b) such representatives are duly authorized to sign such certificate on behalf of you and the Company, respectively, (iii) the date on which an Alternate Letter of Credit (as defined in the Trust Indenture) becomes the "Letter of Credit" for all purposes under the Trust Indenture and following our receipt of a written certificate signed by your officer and a general partner of the Company in the form of Exhibit 8 hereto appropriately completed: (a) stating that an Alternate Letter of Credit has been accepted by the Trustee; (b) setting forth the date on which such

Alternate Letter of Credit becomes "Letter of Credit" and (c) stating that such represented are duly authorized to sign such certificate on behalf of you, and the Company, respectively, and (iv) the Expiration Date, this Letter of Credit shall automatically terminate and be delivered to us for cancellation.

This Letter of Credit is subject to the "Uniform Customs and Practice for Documentary Credits, 1983 Revision, International Chamber of Commerce, Publication No. 400" (the "Uniform Customs"). This Letter of Credit shall be deemed to be made under the laws of the State of Ohio, and shall, as to matters not governed by the Uniform Customs, be governed by and construed in accordance with the laws of the State of Ohio.

Communications with respect to this Letter of Credit shall be in writing and shall be addressed to us at 917 Euclid Avenue, Cleveland, Ohio 44115, Attention: International Operations, specifically referring to the number of this Letter of Credit.

Notwithstanding anything in Article 54(e) of the Uniform Customs to the contrary, this Letter of Credit is transferable in its entirety to any transferee who has succeeded you as Trustee under the Trust Indenture. Each letter of credit issued upon any such, transfer may be successively transferred. Transfer of the available balance under this Letter of Credit to such transferee shall be effected by the presentation to us of this Letter of Credit accompanied by a certificate substantially in the form of Exhibit 9 attached hereto. Following such presentation, and as soon as

this original Letter of Credit is returned to us and we have been paid our customary transfer fee, we shall forthwith transfer the same to your transferee or, if so requested by your transferee, issue an irrevocable letter of credit to your transferee with provisions therein consistent with those Of this Letter of Credit.

This Letter of Credit sets forth in, full our undertaking and shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein (including, without limitation, the Notes and the Trust Indenture), except only the certificate(s) and the draft(s) referred to herein; and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for the forms of such certificate(s) and such draft(s) attached as exhibits hereto.

Very truly yours,

THE HUNTINGTON NATIONAL BANK

***** EXHIBIT I *****

SIGHT DRAFT

_____, 19_

FOR VALUE RECEIVED

Pay at Sight to:
U.S. _____ Dollars (U.S. $____)

Charge to account of Human Services Plaza Partnership

Drawn under The Huntington National Bank Letter of Credit No.___

TO: The Huntington National Bank
917 Euclid Avenue
Cleveland, Ohio 44115

Attention: International Operations

The sum drawn does not exceed the difference between (1) the maximum aggregate amount to be drawn under the Letter of Credit less (II) the aggregate amount of all previous drawings made under the Letter of Credit for which The Huntington National Bank has not reinstated, as certified to us in any Certificate of Nonreinstatement heretofore delivered by you.

THE CENTRAL TRUST COMPANY
N.A. as Trustee

***** EXHIBIT 2 *****

CERTIFICATE FOR "PRINCIPAL DRAWING"

(PRINCIPAL UPON MATURITY,
REDEMPTION OR ACCELERATION)

The undersigned, a duly authorized officer of the Central Trust Company, N.A., as Trustee (the "Trustee"), certifies to The Huntington National Bank (the "Bank") with reference to The Huntington National Bank irrevocable Letter of Credit No. (the "Letter of Credit", the capitalized terms defined therein and not defined herein being used as therein defined) issued by the Bank in favor of the Trustee that:

(1) The Trustee is the Trustee under the Trust Indenture for the holders of the Notes. The aggregate principal amount of the Notes outstanding (as defined in the Trust Indenture), is $ _____.

(2) The Trustee is making a drawing under the Letter of Credit with respect to the payment of principal upon the Notes.

(3) The amount of principal of the Notes which is due and payable or which will become due and payable within two business days after the date hereof is $ _____. The amount of the draft accompanying this Certificate does not exceed such amount.

(4) The amount of the draft accompanying this Certificate, together with the aggregate of all prior payments made pursuant to drawings under the Letter of Credit for the payment of the principal of the Notes, including amounts under Remarketing Drawings representing the principal portion thereof which have not been reinstated under the Letter of Credit, does not exceed $23,500,000.

(5) This is a (partial) (final) drawing.

(6) The amount of the draft accompanying this Certificate was computed in accordance with the terms and conditions of the Notes and the Trust Indenture.

(7) Upon receipt by the Trustee of the amount demanded hereby, (a) the Trustee will apply it directly to the payment when due of the appropriate amount of principal owing on account of the Notes pursuant to the Trust Indenture, (b) no portion of it shall be applied by the Trustee for any other purpose, and (c) no portion of it shall be commingled with other funds held by the Trustee. This drawing is made in accordance with the provisions of the Trust indenture.

IN WITNESS WHEREOF, the Trustee has executed and delivered this certificate as of the day of___, 19___.

THE CENTRAL TRUST COMPANY, N.A.,
as Trustee

***** EXHIBIT 3 *****

CERTIFICATE FOR "REMARKETING DRAWING"

(PURCHASE PRICE OF NOTES DELIVERED TO TRUSTEE FOR PURCHASE)

The undersigned, a duly authorized officer of The Central Trust Company, N.A., as Trustee (the "Trustee"), hereby certifies to The Huntington National Bank (the "Bank") with reference to

The Huntington National Bank irrevocable Letter of Credit No. _____ (the "Letter of Credit," the capitalized terms defined therein and not defined therein being used as therein, defined) issued by the Bank in favor of the Trustee that:

(1) The Trustee is the Trustee under the Trust Indenture for the holders of the Notes. The total aggregate principal amount of the Notes outstanding (as defined in the Trust Agreement) is $_____.

(2) The Trustee is making a drawing under the Letter of Credit to pay, pursuant to Section 6.04 of the Trust Indenture, the purchase price of the Notes duly delivered for purchase on the next succeeding Bond Purchase Date.

(3) The Trustee (a) is in possession of the Notes with an aggregate principal amount outstanding equal to the portion of the amount of the draft accompanying this Certificate representing the principal portion of the purchase price of such Notes and, to the extent the amount of the Remarketing Drawing (less any discount not exceeding 2% at which the Notes are remarketed) is not repaid on the next succeeding Bond Purchase Date from the Remarketing Reimbursement Fund (as defined in the Trust Indenture), will deliver or cause to be delivered to the Bank, or to its designated agent within three (3) business days after the date of this Certificate, such Notes, registered in the name of the Company as pledgor and the Bank as pledgee; (b) acknowledges the pledge by the Company to the Bank of the Notes delivered pursuant to subparagraph (a); and (c) agrees that

all payments of principal, premium, if any, and interest made on such Notes shall be made to the Bank, so long as the Bank is the pledgee of such Notes.

(4) The aggregate principal amount of the Notes delivered to the Trustee for purchase on the next Bond Purchase Date is $ _____. The interest portion of the purchase price for such Notes, if any, is $ _____. The amount of the draft accompanying this Certificate does not exceed the sum of such amounts due as the purchase price of such Notes.

(5) The amount of the draft accompanying this Certificate, together with the aggregate of all prior payments made pursuant to Remarketing Drawings which have not been reinstated under the Letter of Credit for the payment of the principal portion of the purchase price of the Notes and Principal Drawings, does not exceed $23,500,000.

(6) Upon receipt by the Trustee of the amount demanded hereby, (a) the Trustee will apply it directly for the purpose of payment of the purchase price of the Notes referenced in Paragraph 2 hereof, (b) no portion of it shall be applied by the Trustee for any other purpose, and (c) no portion of it shall be commingled with other funds held by the Trustee. This drawing is made in accordance with the provisions of the Trust Indenture.

(7) The amount of the draft accompanying this Certificate was computed in accordance with the terms and conditions of the Notes and the Trust Indenture.

IN WITNESS WHEREOF, the Trustee has executed and delivered this certificate as of the __ day of___, 19_.

THE CENTRAL TRUST COMPANY, N.A.,
as Trustee

***** EXHIBIT 4 *****

CERTIFICATE FOR "INTEREST DRAWING"
(ACCRUED INTEREST)

The undersigned, a duly authorized officer of -The Central Trust Company, N.A., as Trustee (the "Trustee"), hereby certifies to The Huntington National Bank (the "Bank") with reference to The Huntington National Bank irrevocable Letter of Credit No.____ (the "Letter of Credit,") the capitalized terms defined therein and not defined herein being used as therein defined) issued by the Bank in favor of the Trustee that:

(1) The Trustee is the Trustee under the Trust Indenture for the holders of the Notes. The aggregate principal amount of the Notes outstanding (as defined in the Trust Indenture) is $ _____.

(2) The Trustee is making a drawing under the Letter of Credit in respect of payment of accrued and unpaid interest on the Notes.

(3) Interest on the Notes which is due and payable or which will become due and payable within two business days after the date hereof and the amount of the draft accompanying this Certificate does not exceed the amount available on the date hereof to be drawn under the Letter of Credit in respect of payment of interest accrued on the Notes.

(4) The amount of interest accrued on the Notes which is due and payable or which will become due and payable within two business days after the date hereof is $ _____. The amount of the draft accompanying this Certificate does not exceed such amount due as interest or in respect of interest. This is a (partial) (final) drawing.

(5) The amount of the draft accompanying this Certificate, together with the aggregate of all prior payments made pursuant to drawings under the Letter of Credit in respect of the payment of interest accrued on the Notes which, as certified to us by the Bank, the Bank has not reinstated and the interest portion of any Remarketing Drawing which has not been reinstated, does not exceed $352,500.

(6) The amount of the draft accompanying this Certificate was computed in accordance with the terms and conditions of the Notes and the Trust Indenture.

(7) Upon receipt by the Trustee of the amount demanded hereby, (a) the Trustee will apply it directly to the payment when due of the appropriate amount of interest owing

on account of the Notes pursuant to the Trust indenture. (b) no portion of it shall be applied by the Trustee for any other purpose, and (c) no portion of it shall be commingled with other funds held by the Trustee. This drawing is made in accordance with the provisions of the Trust Indenture.

IN WITNESS WHEREOF, the Trustee has executed and delivered this certificate as of the day of

THE CENTRAL TRUST COMPANY, N.A.,
as Trustee.

***** EXHIBIT 5 *****

CERTIFICATE OF NONREINSTATEMENT OF AMOUNTS AVAILABLE FOR REMARKETING DRAWING UNDER IRREVOCABLE LETTER OF CREDIT NO.

The undersigned, a duly authorized officer of The Huntington National Bank (the "Bank"), hereby certifies to the Trustee under the Trust Indenture dated as of _____, 19__, between Human Services Plaza Partnership and The Central Trust Company, N.A. (the "Trustee") with reference to The Huntington National Bank irrevocable Letter of Credit No. ___ (the "Letter of Credit") issued by the Bank in favor of the Trustee that the interest portion of the amount drawn by the Trustee pursuant to its Remarketing Drawing dated as of $ _____, 19_ has not been

reinstated either (a) because the Bank has not been reimbursed for the interest portion of such Drawing or (b) because an Event of Default has occurred under the Reimbursement Agreement dated as of___, 19__, between the Bank and the Company, as defined in the Letter of Credit, and is continuing.

The Trustee is hereby directed to accelerate the maturity of the Notes.

Except as herein expressly set forth, all other terms and conditions of the Letter of Credit remain unchanged.

IN WITNESS WHEREOF, the Bank has executed and delivered this certificate this _____ day of 19__.

THE HUNTINGTON NATIONAL BANK

***** EXHIBIT 6 *****

CERTIFICATE OF NONREINSTATEMENT
OF AMOUNTS AVAILABLE FOR INTEREST DRAWING
UNDER IRREVOCABLE LETTER OF CREDIT NO.

The undersigned, a duly authorized officer of The Huntington National Bank (the "Bank"), hereby certifies to the Trustee under the Trust Indenture dated as of _____, 19__, between Human Services Plaza Partnership and The Central Trust

Company, N.A. (the "Trustee") with reference to The Huntington National Bank irrevocable Letter of Credit No. ___ (the "Letter of Credit") issued by the Bank in favor of the Trustee that the amount drawn by the Trustee pursuant, to its Interest Drawing dated as of _____, 19_ has not been reinstated either (a) because the Bank has not been reimbursed for such Drawing or (b) because an Event of Default has occurred under the Reimbursement Agreement dated as of ___, 19__, between the Bank and the Company, as defined in the Letter of Credit, and is continuing.

The Trustee is hereby directed to accelerate the maturity of the Notes.

Except as herein expressly set forth, all other terms and conditions of the Letter of Credit remain unchanged.

IN WITNESS WHEREOF, the Bank has executed and delivered this certificate this day of ____, 19_.

THE HUNTINGTON NATIONAL BANK

***** EXHIBIT 7 *****

CERTIFICATE THAT BONDS NOT OUTSTANDING

The Huntington National Bank
917 Euclid Avenue
Cleveland, Ohio 44115

Attention: International Operations

Re: The Huntington National Bank
Irrevocable Letter of Credit No.___

Ladies and Gentlemen:

The undersigned, a duly authorized officer of The Central Trust Company, N.A., as Trustee (the "Trustee"), and a duly authorized general partner of Human Services Plaza Partnership (the "Company"), hereby certify to The Huntington National Bank (the "Bank") with reference to The Huntington National Bank irrevocable Letter of Credit No. __ (the "Letter of Credit," the capitalized terms defined therein and not defined herein being used as therein defined) issued by the Bank in favor of the Trustee that:

(1) The Trustee is the Trustee under the Trust Indenture for the holders of the Notes.

(2) No Note is outstanding within the meaning of the Trust Indenture.

(3) The undersigned representatives are duly authorized to sign this certificate on behalf of the Trustee and on behalf of the Company, respectively.

IN WITNESS WHEREOF, the Trustee and the Company have executed and delivered this certificate as of the ___ day of _____, 19_.

THE CENTRAL TRUST COMPANY, N.A.,
as Trustee

HUMAN SERVICES PLAZA PARTNERSHIP, an
Ohio general partnership

***** EXHIBIT 8 *****

CERTIFICATE OF ACCEPTANCE OF ALTERNATE
LETTER OF CREDIT

The Huntington National Bank
917 Euclid Avenue
Cleveland, Ohio 44115

Attention: International Operations

Re: The Huntington National Bank
Irrevocable Letter of Credit No.

Ladies and Gentlemen:

The undersigned, a duly authorized officer of The Central Trust Company, N.A., as Trustee (the "Trustee"), and a duly authorized general partner of Human Services Plaza Partnership (the "Company") hereby certify to The Huntington National Bank (the "Bank") with reference to The Huntington National Bank irrevocable Letter of Credit No. ___ (the "Letter of Credit," the capitalized terms defined therein and not defined herein being used as therein defined) issued by the Bank in favor of the Trustee that:

(1) The Trustee is the Trustee under the Trust Indenture for the holders of the Notes.

(2) An Alternate Letter of Credit (as defined in the Trust Indenture) has been accepted by the Trustee.

(3) The date on which such Alternate Letter of Credit becomes the "Letter of Credit" for all purposes under the Trust Indenture is _____, 19_.

(4) The undersigned representatives are duly authorized to sign this certificate on behalf of the Trustee and on behalf of the Company, respectively.

IN WITNESS WHEREOF, the Trustee and Company have executed and delivered this certificate as of the ____ day of _____, 19_.

THE CENTRAL TRUST COMPANY, N.A.,
as Trustee

HUMAN SERVICES PLAZA PARTNERSHIP,
an Ohio general partnership

***** EXHIBIT 9 *****

The Huntington National Bank
917 Euclid Avenue
Cleveland, Ohio 44115

Attention: International Operations

Re: The Huntington National Bank
Irrevocable Letter of Credit No.

Ladies and Gentlemen:

For value received, the undersigned beneficiary hereby irrevocably transfers to:

(Name of Transferee)

(Address)

all rights of the undersigned beneficiary to draw under the above Letter of Credit in its entirety.

By this transfer, all rights of the undersigned beneficiary in and to such Letter of Credit are transferred to the transferee and the transferee shall have sole rights as beneficiary thereof, including sole rights relating to any amendments, whether

increases or extensions or other amendments and whether now existing or hereafter made. All amendments are to be advised direct to the transferee without necessity of any consent of or notice to the undersigned beneficiary.

The advice of such Letter of Credit is returned herewith, along with your customary transfer fee, and we ask you to endorse the transfer on the reverse thereof and forward it direct to the transferee with your customary notice of transfer.

Very truly yours,

Signature of Beneficiary

APPENDIX R

COMMITMENT LETTER

The Huntington National Bank
PO. Box 5065
Cleveland, Ohio 44101

December 30, 1988

Messrs. Howard H. Shanker and David D. Owen
Human Services Plaza Partnership
c/o DIVCO, Inc.
1127 Euclid Avenue
Cleveland, Ohio 44115

Re: Direct Pay Letter of Credit Secured by a First Lien Mortgage upon a 1.25 acre Parcel of Real Property and the Improvements thereon Located in Cleveland, Cuyahoga County, Ohio

Dear Messrs. Shanker and Owen:

The Huntington National Bank (hereinafter "Huntington") is pleased to advise you that it is prepared to provide an Irrevocable Direct Pay Letter of Credit (hereinafter the "Letter of Credit") secured by a first lien mortgage (the "Mortgage") upon the above-captioned project (hereinafter the "Project") subject to the following terms and conditions:

Borrower:	Human Services Plaza Partnership, an Ohio general partnership.
Guarantors:	Howard H. Shanker, Carol R. Shanker, David D. Owen and Marilyn Owen (jointly and severally).
Letter of Credit Facility:	Letter of Credit to be issued in favor of The Central Trust Company N.A., as trustee (the "Trustee") pursuant to a Trust Indenture to be entered into between Borrower and the Trustee (the "Indenture") in respect of Borrower's indebtedness on Multi-Option Adjustable Rate Notes (the "Bonds") being issued pursuant to the Indenture, whether principal or interest, in the amount of $23,500,000.00.
Annual Fee:	$235,000.00, a non-refundable fee to be paid annually in advance, on the date the Letter of Credit is issued, and each annual anniversary of issuance thereafter.
Letter of Credit Fees:	Borrower shall be obligated to reimburse Huntington for Huntington's costs and expenses related to draws upon the Letter of Credit by the Trustee, including a service charge for each such draw. Such costs and expenses shall be more

fully described in that certain Letter of Credit Reimbursement Agreement to be entered , into between Borrower and Huntington (the "Reimbursement Agreement").

Expiration Date: Drafts on the Letter of Credit must be drawn and presented to Huntington no later than 10:00 a.m. Columbus time on January 15, 1994.

Source of Repayment: Rental income from the lease of Project to Cuyahoga County, Ohio, the assets and income of the Borrower and the personal assets of the guarantors.

Interest Rate: Interest on Drawings made pursuant to the Letter of Credit shall be Computed from the date made at a rate which shall be the sum of one percent (1%) per annum plus the Prime Commercial Rate of the Huntington. "Prime Commercial Rate" shall mean that interest rate established and/or publicly announced by the Bank f rom time to time, based upon its consideration of economic; money market, business and competitive factors and not necessarily the Bank's lowest interest rate. Each change in the Prime Commercial Rate will automatically and immediately change the rate of interest to be

paid on the obligation evidenced hereby.

Payments: Borrower shall pay to Huntington an amount equal to all amounts drawn under the Letter of Credit, plus all costs and fees related thereto, by 2:00 p.m. Columbus time, on the same day on which Huntington honors any draw on the Letter of Credit, subject to the more definite provisions regarding repayment as shall be set forth in the Reimbursement Agreement.

Drawings on the Letter of Credit: Drawings on the Letter of Credit shall be made by the Trustee pursuant to the terms of the Letter of Credit and as required by the Indenture.

Security: First-Lien mortgage on approximately 1.25 acres of land located in Cleveland, Cuyahoga County, Ohio, necessary appurtenant easements, and the proposed improvements thereon; assignment of five (5) year lease between Borrower and the County of Cuyahoga, Ohio (the "Lease"); first-lien security interest in the tangible personal property; and conditional assignments of construction and architectural contracts. Additionally, annual payments of not less than the greater of: (1) $200,000.00; or (2) fifty

percent (50%) of the cash flow after debt service but before other expenses, are to be placed in a Sinking Fund Reserve to be applied to increased interest payments or applied to reduction in outstanding principal amount in the event the Lease is not renewed for a second five (5) year term.

Acceptance of this commitment shall constitute a binding agreement between the parties. The terms and conditions hereof shall survive the closing of the within transaction. This commitment shall become effective only upon receipt by Huntington, within ten (10) days from the date hereof, time being of the essence of two copies hereof with Borrower's acceptance endorsed thereon, together with payment to Huntington of a non-refundable commitment fee of $50,000.00, which shall be deemed fully earned when paid. This commitment may not be assigned by Borrower without Huntington's prior written consent. All documentation and closing requirements shall be in form and content acceptable to Huntington an in counsel. Unless otherwise agreed, the documents shall be governed by Ohio law.

Huntington's obligation to make the Letter of Credit facility available is expressly conditioned upon completion of the following pre-closing requirements, the fulfillment of which shall be an absolute condition to Huntington's obligation under this Commitment, which conditions Borrower hereby expressly acknowledges:

1. Huntington shall provide a letter of credit in the amount of $23,500,000.00, but shall retain $8,000,000.00 of the Letter of Credit and shall use reasonable efforts to obtain from other financial institutions acceptable to Huntington, firm commitments to participate in the Letter of Credit for the approximate remaining portion of $15,500,000.00 whom, in the exercise of Huntington's reasonable discretion, Huntington deems appropriate to participate in the Letter of Credit facility; provided, however, that if Huntington fails to obtain the commitments of other acceptable financial institutions to participate to the extent of $15,500,000 in the Letter of Credit facility on or before thirty (30) days from the date hereof, time being of the essence, Huntington may withdraw this Commitment, whereupon neither Borrower nor Huntington shall have any further rights or obligations one to the other hereunder, and this Commitment shall become null and void.

2. Borrower shall provide a standard ALTA-1970 form mortgagee title insurance commitment in the Letter of Credit amount from a title insurance company acceptable to Huntington. After closing and recording, Borrower shall provide the final policy naming Huntington or its assignee and insuring Huntington's Mortgage as a first and best lien on the Project. The title insurance policy shall contain a variable rate endorsement and such other coverages and endorsements as Huntington may require. The title insurance policy is to insure the priority of

Huntington's assignment of mortgage over filed or unfiled mechanics' and materialmen's liens and as to matters of survey. BORROWER SHALL NOT BEGIN CONSTRUCTION UNTIL AUTHORIZED IN WRITING TO DO SO BY THE TITLE INSURANCE COMPANY AND HUNTINGTON. Borrower's title to the Project is to be satisfactory to Huntington, free of, all liens, encumbrances and other exceptions other than the Mortgage, the Lease (the continuing validity and enforceability of which shall be a condition to the performance of Huntington's obligations hereunder), and other exceptions approved by Huntington. If the title insurance commitment contains exceptions for blanket easements which cannot be located on the survey, Borrower must have the easements defined through their owners (e.g. utility companies) in order to have them located on the survey. In addition, if there are record easements which interfere with the Project, Borrower shall cause such easements to be released of record prior to closing. The title insurance policy shall include affirmative insurance against forced removal of improvements because of blanket easements, or easements required to be released but with Huntington's consent not released of record until after closing.

3. Borrower shall provide a current boundary survey issued by a registered surveyor in compliance with Huntington's survey requirements, a copy of which is available upon request. The survey must locate improvements, access roads, curb cuts, utilities, easements, building setback lines and all other encumbrances set forth in the title insurance commitment and must be certified to Huntington and to the title insurance company in accordance with ALTA/ACSM 1986 minimum standards. Access to and from the Project shall be by public road or title-insured easement. The land must be a separate subdivision and tax parcel.

4. Borrower shall execute such other documents as Huntington may require, including, but not limited to, all documents related to the issuance and placement of the Bonds, the Indenture, the Reimbursement Agreement, and the Placement Agreement between Borrower and The Huntington.

5. A separate guaranty agreement shall be executed by Guarantors. It shall provide, among other things, that there shall be no transfer of major assets by Guarantors without the prior written consent of Huntington. Guarantors shall provide current financial statements prior to closing and at least annually thereafter, in form and content acceptable to Huntington.

6. The Mortgage shall specifically provide among other things for the following:

   a. There shall be no substitution of principals without the prior written consent of Huntington;

   b. There shall be no transfer or further encumbering of the Project without the prior written consent of Huntington;

   c. Borrower shall provide annual operating statements on the Project within 90 days after the end of the fiscal year, in form and content acceptable to Huntington, commencing with the first year or partial year of operation after completion; and

   d. Borrower shall warrant environmental compliance of the Project and indemnify Huntington and its successors and assigns against loss, damage and liability from non-compliance.

7. All existing and future leases or agreements shall be subject to approval by Huntington and shall be assigned to Huntington as additional security for the Letter of Credit. Huntington reserves the right to require tenant acceptance statements and estoppel and attornment certificates.

8. Neither Borrower nor Guarantors shall have experienced any material adverse change in financial condition or creditworthiness. if Huntington determines that such change has occurred, Huntington shall have the right to terminate this Commitment.

9. Borrower shall pay all costs and expenses incidental to the loan whether or not the loan is closed. Such costs shall include, but not be limited to, fees and out-of-pocket expenses of Huntington's general and local counsel, title insurance premiums and costs, recording fees and taxes, appraisal fees, survey fees, and inspection fees.

10. Borrower shall provide an executed copy of Borrower's construction contract with Turner Construction Company along with AIA document A 305, "Contractor's Qualification Statement." All contractors shall be subject to approval by Huntington. In addition, Borrower shall provide a payment and performance bond. Huntington shall also require copies of Borrower's major subcontracts.

11. Borrower shall provide a final and complete set of construction plans and specifications for the Project indicating all required governmental approvals, a copy of the soils engineering report, and evidence that the

improvements and their proposed use comply and when completed will continue to comply with all applicable toning,building, and other governmental laws, regulations, and requirements, such evidence to include without limitation building permits, curb cut permits and site plan approvals.

12. Borrower shall provide, on request, an environmental report prepared by a licensed environmental engineering firm acceptable to Huntington which report must indicate that the Project is free from hazardous waste contamination.

13. Borrower shall provide a complete list of costs for the Project, including all anticipated soft costs. The cost breakdown must clearly indicate the amount and timing of Borrower's equity contribution to line items.

14. Borrower shall provide a projected schedule of construction progress and Bond proceeds disbursements.

15. Borrower shall provide evidence that public water, sewer, and other required utilities are available to the Project in sufficient capacities.

16. Borrower shall provide a builder's all risk insurance policy, together with a fire and extended coverage insurance policy with payment receipt. The policy must be in an amount, and must be issued by a company or

companies, satisfactory to Huntington, containing a standard mortgagee clause naming Huntington and its designees as loss payees. Borrower shall provide a liability insurance policy in an, amount and with companies satisfactory to Huntington, naming Huntington and its designees as additional insureds. Borrower shall provide evidence of adequate worker's compensation insurance covering its responsibilities under applicable state law.

17. Borrower shall provide evidence that no portion of the completed improvements will be located in a f flood hazard area designated by The Department of Housing and Urban Development. If any portion of the completed improvements is located in a flood hazard area, Borrower shall purchase flood insurance.

18. Borrower shall provide a descriptive,, narrative appraisal (prepared in accordance with R-41C standards) by an MAI appraiser acceptable to Huntington, indicating an appraised value satisfactory to Huntington.

19. Borrower shall provide a certified copy of Borrower's partnership agreement and certified copies of Borrower's partnership certificates and other required filings as filed with all appropriate authorities. Borrower shall provide a certified copy of resolutions, a certified copy of articles of incorporation and a current certificate of good standing in the state of incorporation for each corporate

general partner.

20. Borrower shall provide a favorable opinion of Borrower's counsel on valid organization and existence of Borrower; authorization, valid execution and delivery and binding effect of the documents; absence of conflict with other obligations; absence of litigation affecting Borrower or the Project; and such other matters as Huntington may require.

21. Borrower shall select and engage a construction manager for the Project, which must be reasonably acceptable to Huntington.

Huntington's attorneys will be Porter, Wright, Morris and Arthur, 1700 Huntington Building, Cleveland, Ohio 44115, and 41 South High Street, Columbus, Ohio 43215. Please provide Huntington's counsel with the title insurance commitment, the survey, the site plan and copies of organizational documents as soon as possible to allow preparation of necessary documents. Unless Huntington otherwise agrees in writing, all pre-closing requirements must be submitted to and approved by Huntington before a closing date is established.

22. After closing and after recording, but before any work whatsoever can commence, Borrower shall provide two executed copies of a pre-construction affidavit together with photographs, acceptable to Huntington and to the title insurance company.

23. Upon completion of construction of the Project's foundation and prior to disbursements of Bond proceeds for foundation work, Borrower shall furnish a foundation survey showing the exact location of improvements on the Project together with building setback lines, access roads, curb cuts, easements, and all other encumbrances set forth in the title insurance policy. The survey shall comply with Huntington's survey requirements.

24. Without prior written consent from Huntington, Borrower shall not:

a. authorize any major construction change orders; or

b. enter into any secondary financing arrangement.

25. All construction must be commenced within one (1) month after Bond closing and must be completed by eighteen (18) months after closing of the Bond transaction.

26. Upon completion of construction, Borrower shall provide Huntington with a satisfactory "as-built" narrative appraisal, a satisfactory "as-built" survey conforming to Huntington's survey requirements, and a policy of hazard insurance in an amount and with a company or companies satisfactory to Huntington, with rent loss endorsement in an amount satisfactory to Huntington,

containing a standard mortgagee clause naming Huntington and its designees as loss payees.

27. Borrower shall name Huntington as the source of financing on any construction sign erected on the Project.

28. This Commitment Letter constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof, superseding any and all negotiations and discussions between the parties. No other documents, instruments or similar or dissimilar written on verbal matters preceding the date hereof shall or may be used to vary or alter the provisions hereof.

Very truly yours,

THE HUNTINGTON NATIONAL BANK,

By: THE HUNTINGTON MORTGAGE COMPANY,
its authorized agent,

/s/
Roger B. Buxton
Vice President

APPENDIX S

JURY VERDICT

United States District Court
Northern District of Ohio

Human Services Plaza Partnership, Plaintiffs,	)	
	)	Verdict
v.	)	
Huntington National Bank; et al., Defendants.	)	Case No. 1:90CV811

Count II

We, the Jury,

XX find for the Plaintiff.

We assess its damages on Count II against HNB and HMC at $6,154,903.00. (N.C.)

____ We the Jury find for said defendants and assess no damages.

Count IV

We, the Jury,

___ find for the Plaintiff.

We assess its damages on Count IV against HNB and HMC at $_____.

XX We the Jury find for said defendants and assess no damages.

Count V

We, the Jury,

___ find for the Plaintiff.

We assess its damages on Count V against at $___.

XX We the Jury find for said defendant, The Huntington Company, and assess no damages.

Count V

We, the Jury,

____ find for the Plaintiff.

We assess its damages on Count VII against HNB at $_____.

XX We the Jury find for said defendant and assess no damages.

dated: May 21, 1993

Nicole Craciun
Jury Foreperson

APPENDIX T

JUDGMENT

United States District Court
Northern District of Ohio

Human Services Plaza Partnership, Plaintiffs,	)	
	)	Judgment
v.	)	
Huntington National Bank; et al., Defendants.	)	Case No. 1:90CV811
	)	Senior Judge William K. Thomas

XX Jury Verdict. This action came before the Court for a trial by Jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND AJUDGED that judgment is hereby entered on Count II of the complaint in favor of Human Services Plaza Partnership, and against Huntington National Bank and Huntington Mortage Company and assess damages in the

amount of:

$3,077,451.50 against Huntington National Bank
$3,077,451.50 against Huntington Mortgage Co.

for a total of $6,154,903.00.

IT IS FURTHER ORDERED that judgment is rendered in favor of Huntington National Bank and Huntington Mortgage Company and against plaintiff on Count IV of the complaint and is dismissed with prejudice.

IT IS FURTHER ORDERED that judgment is rendered in favor of the Huntington Company and against plaintiff on Count V of the complaint and is dismissed with prejudice.

IT IS FURHTER ORDERED that judgment is rendered in favor of the Huntington National Bank and against plaintiff on Count VII of the complaint and is dimissed with prejudice.

IT IS FURTHER ORDERED that the motion of defendants for a directed verdict on Counts III, VI and VIII of the complaint is hereby granted and said counts are dismissed with prejudice as stated on the record.

dated: May 24, 1993

Geri M. Smith
Clerk

APPENDIX U

EXCERPTS FROM HSPP'S CLOSING ARGUMENT

to rely upon it.

I'll turn to the defendants' contentions with regard to statute of frauds. This does appear in their answers not only to plaintiff's first complaint, but also to the amended complaint filed just before this trial. There has been no dispositive motion filed by the defendants on this issue.

First of all, they claim that under Ohio Revised Code 1335.05 that this letter of credit was an agreement made upon consideration of contract for the sale of lands and they specifically say that this -- this transaction involved an assignment of a lease and a mortgage on real estate. They say that this transaction is not enforceable because the understanding did not encompass these terms in a written document.

I believe that they are wrong for the following reasons: First of all, the $825,000 loan which is acknowledged by all parties to be an essential element of the entire transaction, one part of three, specifically has within it a mortgage on the property which includes anything to be built on it later. It includes an assignment of a lease which would be entered into when the final transaction was consummated and the building built.

There is a writing that satisfies any potential statute of frauds problem.

Further, since they are claiming that the statute of frauds in this regard applies to a real estate transaction, there has obviously been partial performance which removes it from the statute of frauds. Part performance is recognized as an exception to the statute of frauds with regard to real estate transactions.

They also state that the statute of frauds bars this transaction because it ostensibly calls for the answering of the debt of another person. This is not that kind of transaction. This is an agreement to enter into a letter of credit; not a litigation to enforce the terms of the letter of credit as a creditor would. We don't even reach that stage until the letter of credit is in place.

This is not the kind of transaction that the statute of frauds applies to in this regard.

Finally, they say it can't be performed within one year. Again, this is an agreement to enter into a letter of credit; not the letter of credit itself. That agreement can be performed within one year.

Further --

APPENDIX V

Excerpts from the Testimony of David Owen

A. Well, if the buyer can't obtain financing to buy the property, then the purchase agreement fails.

Q. Okay. So the way this transaction was structured was such that -- well, why don't you tell me in your own words what did this afford you the opportunity to do?

A. Well, in essence it was a purchase agreement to be completed at such time as the project acquired the money with which to buy the property. And it permitted us, the project, to make the proposal to the county because it would have had control of the entire site.

Q. Okay. Do you know what the value of that gas station was, the fair market value?

MR. MARKUS: Objection

THE COURT: Objection sustained to the form of the question.

BY MR. KAHN:

Q. Mr. Owen, at one point in time did you become an owner or a part owner of that gas station?

Maybe I should lay a foundation first.

Mr. Owen, can you tell the jury who DIVCO is?

MR. MARKUS: I'm sorry, I couldn't hear, Sir.

MR. KAHN: Who DIVCO --

MR. MARKUS: Oh.

A. DIVCO was a corporation which I had created to

become a partner in the partnership that was ultimately created between Mr. Shanker and myself.

Q. So the actual partner in the Human Services Plaza partnership was this corporation DIVCO?

A. The partnership -- the partner as far as I was concerned, yes.

Q. Okay. And you owned all the stock in DIVCO; is that correct?

A. That's correct.

Q. So in essence it was a one-person corporation that was a partner, and you were the owner of that corporation?

A. That is correct.

Q. Did you, as owner of DIVCO, or did DIVCO ever have an interest as partner in this property?

A. Not until the property was acquired or paid for, and believe that was on August 25th, 1988.

Q. And your ownership interest in that property then would be as a partner, DIVCO as a partner of Human Services Plaza partnership; correct?

A. That was the -- yes.

Q. And as an owner of this piece of property, the gas. station alone, do you have an idea of what the gas station alone would have been worth?

MR. MARKUS: Objection.

THE COURT: Side bar, counsel.

Calabrese -- Caruso, I'm sorry -- vice president, the Huntington Mortgage Company, and signed by me.

Q. Okay. And what is this letter doing?

A. This letter is advising Mr. Caruso that pursuant to a conversation -- telephone conversation we had had on the previous day I was going to be -- commence demolition of the gas station building on the so-called Rafuse site.

Q. Okay. Is that the property that was bought with the $825,000 loan?

A. Yes, sir.

Q. Did Mr. Caruso authorize you to knock down the gas station?

A. That was the purpose of the conversation on the day before, and he did.

Q. And did you knock it down?

A. I did.

Q. Personally?

A. Well, not quite.

Q. Sorry. Now, would you take a look at Exhibit Number 271?

MR. MARKUS: Could we have a date, Mr. Kahn?

MR. KAHN: Certainly.

THE WITNESS: November 30th.

Q. But Huntington by this time had told you that, by January 10th, had told you that they were requiring participants; correct?

A. Yes.

Q. And at some point did you contact either National City Bank or Society National Bank, that you recall?

A. Sometime, but I don't recall with precision when.

Q. Now, it also has "third" up in the upper right-hand column, do you see that?

A. Yes.

Q. Is that addressing your concern about the $50,000?

A. Yes.

Q. Now, page five.

A. Paragraph number one, the words, "Whereupon neither borrower nor Huntington shall have any further rights or obligations one to the other hereunder, and this commitment shall become null and void" have been stricken and words to the effect of "which shall not --"

Q. "Prejudice"?

A. "-- prejudice the rights of either HNB or borrower hereunder or otherwise"

Q. Okay.

A. -- have been substituted.

Q. I notice you didn't strike out the requirement for participants, did you?

A. No.

Q. Why not?

A. Well, if they were going to try, we'd let them try.

Q. Okay. Now, why do you circle the language on the bottom of that paragraph, paragraph one?

A. I have no other changes on page five than the ones I just gave you.

Q. Yes, but why was the language stricken, "Whereupon neither borrower nor Huntington shall have any further rights or obligations one to the other hereunder, and this commitment shall become null and void, " you struck that and substituted "which shall not prejudice the rights of either HNB or borrower hereunder or otherwise." What were you intending to do?

A. Well, we felt we had certain rights under the original financing scheme that had fallen apart on December 19th. We didn't want to prejudice any of those rights by signing something we felt might waive those rights.

Q. Okay. When you say "prejudice," you mean give up?

A. Give up or change them in any way.

Q. Next change.

A. Page seven, paragraph 6A, we added the words to the end of the sentence, "There shall be no substitution of principals without prior written consent of Huntington. The same shall not be unreasonably withheld."

Q. What does it mean by "substitution of principals"?

A. Well, we were -- the partnership was the principals -- was the principal. In this instance the word could mean either, I would say, the principals of the partnership or the partnership as the principal to the borrowing.

Q. What were you asking the bank to do in inserting this language?

A. If either one of the partners wanted to change his relationship, get out of the partnership or the partnership found a buyer for the project, we wanted to be able to substitute the borrower or the partner and we wanted to be able to do it with the permission of the Huntington or the -- but we did not want that permission to be unreasonably withheld.

Q. Okay. And the next change.

A. Paragraph B, the same sort of concern. This had to do with construction of tenant improvements and the construction of the project, "and the borrower shall afford Huntington the first right of refusal to provide such a loan, the same which shall not be unreasonably withheld."

Q. Okay. Next changes?

A. Page eight, paragraph number nine, the original language, "Borrower shall pay all costs and expenses incidental to the loan whether or not the loan is closed," that was just again an open checkbook to give Huntington

Q. Can you describe what it is, please?

A. It appears to be a telephone memorandum.

Q. Can you read the title on it?

A. In the Porter, Wright, Morris & Arthur law firm, it's dated 1/20 -- January 20th, taken by operator Maureen, and the --

MR. MARKUS: Your Honor, we will, I think, obviate the issue. We will stipulate that this is a fax transmittal sheet which attaches a letter that was faxed at the time, rather than a telephone memorandum. I don't know whether this witness has ever seen any part of this, but we will stipulate this is what it says it is.

MR. KAHN: Yes. Okay.

THE COURT: All right.

BY MR. KAHN

Q. What time of day is that fax sent at?

A. 4:45 p.m.

Q. And what day is that?

A. January 20th.

Q. Okay. And what's the content of the letter?

A. The letter is a letter from Huntington Mortgage Company signed by Roger Buxton, vice-president, dated January 20th, 1989. It was sent via telecopier and messenger to Howard Shanker and David Owen at Human Services Plaza Partnership, "In re: Central Trust Company,

negative response to participation."

Q. Now, that was sent care of Robert McIntyre, McIntyre, Kahn and Kruse?

A. Yes.

Q. Okay. And what's -- would you read the first paragraph, please?

A. "Dear Messrs. Shanker and Owen: Central Trust Company has advised us that its loan committee has determined not to participate in the letter of credit facility for the project. Upon receiving word of the Central Trust Company's decision, I followed up with Central's loan officer to determine whether their decision in the matter might be changed. Central has confirmed with me that their decision in this matter is final."

Q. Thank you. Does that refresh your memory as to when you got notice that Central Trust --

A. It tells me I got notice on January 20th, 1989.

Q. Okay. Thank you. Would you please look at Exhibit Number 314, please? I think it's dated April 14th, 19 --

MR. BADDELEY: As long as you haven't introduced them before we can find them. It's the ones you have introduced we have trouble with.

MR. KAHN: Oh.

A. Plaintiff's Exhibit 314.

Q. Yes.

offices of Hancock's attorney, we discussed, Mr. Abbott and I, discussed the possibilities of rebidding the project or rebidding the lease. He felt that that would take somewhere between 45 and 60 days to accomplish that.

Q. What would that do to your construction schedule?

A. Well, at the point in time when we had those discussions, which was, we will say, the end of July, that would have put a start somewhere into October or November of 1989. I did not know, would not have been able to determine at that time what that would have done to the Turner guaranteed maximum price.

Q. What were your creditors doing at this point in time?

A. As any creditor owed a lot of money, they were very concerned. They had heard rumors of these problems, and they were rightfully concerned as to when and how they were going to get paid.

Q. Okay. So what was the result of this, of these conversations with Mr. Abbott?

A. Well, Mr. Abbott told us that -- told me that he was reluctant to rebid the project or to rebid the lease. He was concerned about the time and he was also concerned that he, even if we did rebid the lease, he would be reluctant to award us the lease because of an appearance of favoritism. With that we began to move directly toward how

we could unwind the project and permit the county to buy out the various components of the project.

I had argued with Mr. Abbott that given the understandings of the lease which were that he would buy them out at market value, that he should buy the project out at market value as a project.

Mr. Abbott or his attorney, I don't recall which, which would have been Squire, Sanders and -- no, I forget the law firm offhand -- but his attorney argued that the county was not permitted to buy out the project as a project but they had to buy out the project in components, various elements.

Q. Was that done?

A. That's what we began to move to do, and it was ultimately accomplished.

Q. Did Mr. Abbott agree to pay you. your anticipated profits?

A. No.

Q. Do you recall how much you ended up receiving after the settlement, you, David Owen or DIVCO?

A. Well, something in the -- DIVCO received gross something in the neighborhood of $400,000. A goodly portion of that was reimbursement for costs, expenses, cash advances and things of that sort which DIVCO had made to the project. Some portion of it was in compensation for

Read the question again, please.

(Record read.)

THE COURT: Overruled.

A. Could you read that one more time, please?

(Record read.)

A. Backup lender in mind, yes, I would accept that. Yes.

BY MR. MARKUS:

Q. All right, sir. At the time that the county accomplished its transaction with the partnership, you sold your partnership interest; true?

A. Correct.

Q. To Mr. Shanker?

A. That's correct.

Q. For $500?

A. That's correct.

Q. Did you also receive payment -- excuse me. Who paid you the $500?

A. Mr. Shanker would have.

Q. Okay. Did you also receive payment for the services that you had contracted to provide or fees for the partnership?

A. Yes, some of them.

Q. Didn't get full payment?

A. Correct.

to ratification, what was your understanding was left to be done with respect to the letter of credit?

THE WITNESS: Yes, and I had gotten through the approval by committee and I had gotten to the point where I felt that the December 19th meeting was a ratification by the committee, loan committee, of what had already been agreed to by ratification of the details of the transaction.

That was my -- what I understood was occurring.

THE COURT: Well, we have got to take --

MR. MARKUS: I would prefer --

THE COURT: -- take care of two matters out of your presence.

MR. MARKUS: Thank you.

THE COURT: You may return.

(The witness is away from side bar.)

THE COURT: First as to the question that you put and his answer, on what basis do you think that it is admissible?

MR. KAHN: Your Honor, it's admissible on the grounds that this is a contract that is implied by both the conduct and the actions of the parties. You have the specific documents changing hands, you have partial performance by the borrower, you have --

THE COURT: Let me just say this: The

APPENDIX W

Excerpts from the Testimony of Howard Shanker

Q. Okay. And what did you have to do in order to obtain that funding besides the lease?

A. For the -- for the large loan?

Q. Yes.

A. Well, he was concerned almost immediately that I did not have -- possess the ability to do this myself; that I had to get somebody involved in the transaction with me who-who was really a developer, who had the background as a developer.

Q. Okay. And did you at some point in time prior to the actual funding of the $825,000 loan, did you advise Mr. Caruso with respect to some problems you were having with Mr. Owen?

A. Yes. The way I -- we initially structured the transaction or the way it came to me was through Mr. Nicklos, and Mr. Nicklos introduced me, I believe you have heard, to Mr. Owen, who you have met.

MR. MARKUS: Mr. Shanker, your voice is dropping again.

THE WITNESS: I'm sorry.

MR. MARKUS: Thank you.

A. I was introduced to Mr. Owen, I believe who everybody has met, and basically I was very sold on using ;Mr. Owen but I was concerned about actually having the performance; that actually the building be up and the Shanker

county occupy it for him to be paid.

Q. Okay. When you say "paid," are you talking about his partnership interest or are you talking about --

A. Yes. Yes. For him to vest -- he wanted percent of the project, and I agreed to basically to go ahead with that philosophy if the building was actually built, and until then that he would get a salary for expenses.

Q. And did Mr. Owen dispute that?

A. Yes. Mr. Owen --

MR. MARKUS: Objection.

A. -- did dispute it. He wanted -- immediately he wanted percent of -- actually my total assets was basically this building. He wanted to have title to the property put in the name of a new entity to be formed.

Q. And did he tell you why he needed that?

A. Well, I think he wanted protection for himself and he was concerned also about the tax ramifications of if he, for some reason, if he got the property when it was the warehouse and a vacant lot, it had one value if he vested then.

And then if he would have received the property, percent of this million dollar building when it was completed, it had another tax impact to him.

Q. Okay.

MR. MARKUS: Move to strike the portion relating to the supposed value of the project.

THE COURT: That goes out, but otherwise the conversation with Owen may stand.

BY MR. KAHN:

Q. Did you explain this problem between you and Mr. Owen to Mr. Caruso?

A. Yes, there was quite a bit of discussion about the problem because I was very, very concerned about transferring my assets to Mr. Owen until there was performance of the building.

Q. Okay. And what did Mr. Caruso indicate to you?

A. Basically that there was no way that this transaction could be -- come to fruition unless Mr. Owen was a partner at once.

Q. And what did you do in response to that?

A. Well, I tried my best to have David be a consultant, an advisor, to structure the proposal so David would vest afterwards, and it got to a point where there was an impasse and basically Mr. Caruso told me, "No David, no deal."

Q. Okay. How did this relate to the closing date with respect to the Rafuse property?

A. Well, we had fought about it, friendly discussions about it continuously right up until almost to the last

minute where it became -- it became evident to me that the bank was not going to relent on this, and it was also evident to me that I did not know how to build a very large office building.

Q. Okay. Now, I take it then that loan eventually funded; correct?

A. Yes, I -- I did agree to and, in fact, did transfer percent of my property to the partnership which went into -- I believe into a company called DIVCO which Mr. Owen owned.

Q. Well, DIVCO became the partner; correct?

A. I'm not sure at that I believe eventually DIVCO was the partner.

Q. Okay. The property-- let me get the deeds. I is think we have them with us.

Can you take a look at Exhibit Numbers 377 and 378 and maybe that will help you recall who -- where the property was put.

A. It was 378, the Human Services Plaza Partnership.

Q. Okay. Now, would you identify 378? Who is that a deed from and who is it to?

A. It's from Howard Shanker and my wife Carol to Human Services Plaza Partnership.

Q. Okay. And is it --

A. It's on August 25th.

Q. All right. And Exhibit 377, can you identify that?

A. This is to Human Services Partnership -- Plaza Partnership, and this is from Scott Rafuse who -- Scott was the owner of the gas station at 17th and Superior.

Q. Okay. Now, I'd like to draw your attention to Exhibit 373 and maybe you can tell us the date that the partnership was actually executed.

A. This is also on the 25th day of August, 1988.

Q. Okay. Now, at the time that you were making the $825,000 loan, did you have an occasion to meet Mr. Buxton sometime between --

A. Yes. Yes. I met -- I kind of would go over to the offices of the real estate division of the bank, and on one occasion or several occasions -- I believe on one occasion very early in the transaction I had stopped in to see Mr. Caruso and he wasn't at his desk, and I met Mr. Buxton and we talked briefly about the project.

I guess he was aware a little bit of the size of the project, it was a 20 million dollar project, and he told me that Tony was the person to deal with; that he was one of their top people in Cleveland and that he could definitely get the job done for me.

Q. Now, I'd like to talk a little bit about what happened with respect to during -- prior to funding of the $825,000 loan. I believe you entered into a purchase

THE WITNESS: It was the third or fourth visit to the bank, in the early --

THE COURT: I know, but in months?

THE WITNESS: June, between -- sometime in June, middle of June.

BY MR. KAHN:

Q. Now, Mr. Shanker, can you describe your relationship with Mr. Caruso as it developed at the Huntington?

A. We had a very good relationship with Mr. Caruso.

Q. And what type of things did he do for you?

A. Well, he was providing me with advice on how to structure the transaction so that it would be something that the Huntington could lend on.

Q. Okay. You were here when Mr. Caruso had testified. He had mentioned something about a first and last look. Can you tell us what your understanding was of what he was referring to with respect to "last look"?

MR. MARKUS: Objection.

THE COURT: Objection sustained.

BY MR. KAHN:

Q. Okay. Mr. Shanker, did you and Mr. Caruso ever discuss your providing him with information that was being supplied to you by other lenders?

A. Yes.

Q. Can you tell us how that -- what the conversations

were between you,and Mr. Caruso with respect to that?

A. Well, yes. Mr. Caruso told me that if I got the lease, that the Huntington would fund this projec one way or the other. And I agreed to provide him with the other proposals that -- the details of the other proposals that other banks were making because I was very concerned about transferring my property to Mr. Owen, so I was more concerned in getting the whole thing done and he wanted to know, and I agreed to give them a last look. If everything was equal, didn't have to be better, that I agreed to give Huntington the business for the total package.

Q. Why, why were you providing that information to him?

A. Because he had agreed to do the entire package, the $600,000 loan, the $825,000 loan, and then the large loan of which at that time was 20 million; turned out to be 23 and a half million.

Q. Okay. And what was your reason for wanting to keep looking?

A. Well, it wasn't so much my reason at that point; it was Mr. Owen wanted to -- this was a deal that I had made with Mr. Caruso without Mr. Owen, and it was that Mr. Owen was now an owner of the partnership and he wanted to make sure that the rates were competitive.

Q. I'd like you to now take a look at Exhibit Number

A. Not that I recall.

Q. I'd like to ask you some questions now about matters that Mr. Whitman may or may not have advised you of.

Did Mr. Whitman ever tell you about Mr. Buxton's feelings towards making the deal as compared to being sued?

A. No, he did not.

Q. What did Mr. Whitman tell you, if anything, about Mr. Buxton's personal feelings towards you?

A. He -- he didn't tell me anything.

Q. What advice did Tom Whitman give you with respect to executing the commitment letter?

A. He told me not to.

Q. How did Huntington Company's involvement in this transaction -- when I say Huntington Company, referring to Mr. Whitman at Huntington Company -- how did that affect you?

MR. MARKUS: Excuse me, I don't understand.

A. It

THE COURT: Read the question, please, Sue.(Record read.)

THE COURT: Not clear. Restate the question, please.

fair treatment?

A. Right, that was the fruition.

Q. Now, you have told us that Mr. Caruso made some statements about it's a done deal at some time, do you remember that?

A. Yes. Yes.

Q. Was that during the period of the first promise, that is before November 23rd, or was it at the November 23rd meeting or after the November 23rd meeting?

A. It was after November 23rd. I believe when he called me he was referring to the information he had regarding the sale of the bonds. The bonds were sold.

Q. Excuse me, I can't hear you, sir.

A. The bonds were sold.

Q. Yes, sir.

A. And he said it was a done deal.

Q. So that would be after November 23rd?

A. I think it was early December.

Q. Early December. That's when he made made the statement about it's a done deal?

A. Yes.

Q. Do we nowhave all of the times that Mr. Caruso made a promise; early June, November 23rd and the statement, "It's a done deal" sometime in early December?

A. Yes.

APPENDIX X

Excerpts from the Testimony of George Emmons

Q. Who was the chairman of the bank in 1988?

A. When I use the chairman of the bank, would have been Frank Wobst. When I use the word bank I'm talking about Huntington Bancshares.

Q. All right. Who was the president of Huntington National Bank at that time?

A. Carl Alderman.

Q. Carl Alderman. Who presided at the senior loan committee meetings?

A. Carl Alderman.

Q. Do you know what authority Carl Alderman all by himself had?

A. I believe it was the legal lending limit of the bank.

Q. Does this bank, from your knowledge, legally have authority to lend 23 and a half million dollars if it chooses to?

A. Yes, it does.

Q. More than that?

A. Yes, it does.

Q. How much more than that?

A. Aggregate legal lending limit of the bank in 1988 would have had to have been --

Q. To one customer?

A. To one customer, would have been between 85 and 95

million dollars.

Q. Now, you used the word "underwriting" in answer: Mr. Kahn's questions. Tell me, does underwriting mean the same thing or a different thing than authority to approve.

A. It's a different--

Q. What's the difference?

A. Underwriting is the process in which you develop credit facility request. Approval is the process in which you evaluate the information on the credit facility request to determine whether to approve, modify or decline the loan.

Q. Did Anthony Caruso have authority to gather information for that underwriting process?

A. Yes, he did.

Q. Did Anthony Caruso have authority to commit any part of the Huntington system to a 23 and a half million dollar letter of credit?

MR. KAHN: Objection. Side bar, please.

THE COURT: Okay.

(At side bar out of the hearing of the jury:)

MR. KAHN: Your Honor, I think he's asking this witness to draw a legal conclusion because I think I that officers of the bank most certainly can commit banks to -- officers of banks most certainly can commit them to lend funds.

if that's helpful.

THE COURT: Thank you.

BY MR. MARKUS:

Q. You were asked about the relationship between the Huntington Mortgage company and the Huntington National Bank. Can you tell us whether the Huntington Mortgage company ever issued a letter of credit to your knowledge?

A. it did not.

Q. Does it have the function of doing that?

A. It cannot.

Q. Can you tell us whether appropriate persons at the Huntington Mortgage Companycan act for the Huntington Mortgage Company?

A. I'm sorry, please repeat your question.

Q. Are there personnel at the Huntington Mortgage Company who have authority to take actions for the Huntington Mortgage Company?

A. Yes, there are.

Q. All right. Can you tell us whether or not the Huntington Mortgage Company has authority to act for the Huntington National Bank for some purposes?

A. Yes, they do.

Q. Tell us what purposes the Huntington Mortgage Company has authority to act for the Huntington National Bank.

A. We are authorized, Huntington Mortgage Company commercial real estate personnel are authorized representatives to issue comitmento, to close loans, to collect loans, to institute foreclosure, and that would probably be the three major areas.

Q. All right. Look, if you will, please, at again Exhibit Number 17 which is the proposed commitment letter dated December the 30th, 1988. How is it signed?

THE COURT: What is that Exhibit Number again?

MR. MARKUS: It's Exhibit Number 17.

A. It's signed, "Very truly yours, the Huntington National Bank by the Huntington Mortgage Company, its authorized agent, by Roger B. Buxton, vice president."

Q. All right. Now, did the Huntington Mortgage Company have authority to sign written commitment letters approved by the Huntington National Bank?

A. Yes.

Q. To your knowledge did Mr. Buxton have authority to take that action on behalf of the Huntington Mortgage Company, to execute as an agent for the Huntington National Bank such a commitment letter?

A. Yes.

Q. You were asked about referrals, whether personnel of Huntington Bancshares were encouraged to make referrals.

APPENDIX Y

Excerpts from the Testimony of Anthony Caruso

transaction, where were you on this chart in approximately November of 1988?

A. I honestly can't recall.

Q. Would it have been likely it was over 200,000?

A. I -- I just can't recall the numbers.

Q. Now, what was your understanding -- what was your understanding of what you would make or what you would get paid by someone if you were to do a MORAN transaction?

A. On this particular transaction

Q. Yes.

A. -- if the customer was to take the MORAN technique, I believed I would make $100,000 personally over and above my salary.

Q. What do you base that on?

A. I base that on an agreement I had with a member of the Huntington Company based on discussions and referrals that we had had on this particular transaction.

Q. Were you ever shown a referral fee program?

A. Yes, I was.

Q. Can you take a look at Exhibit Number 80, please?

MR. MARKUS: What number, please?

MR. KAHN: Eighty.

THE COURT: Plaintiff's?

MR. MARKUS: Thank you.

MR. GRAY: Yes, your Honor.

conducted the interrogation at the side bar or that it's being read to the jury rather than having counsel develop it. I do state an objection on behalf of the defendants to the substance of the evidence on the grounds of relevance.

There is no showing that it relates to any of the claims in the case, and I appreciate that the Court is overruling my objection.

(End of bench conference.)

(Testimony of the witness Caruso given at the side bar read to the jury at this time.)

BY MR. KAHN:

Q. Mr. Caruso, is it fair to say if you were able to get Human Service Plaza Partnership to pay one and a quarter percent for a placement fee instead of three-quarters of a percent, that extra half a percent would go to you?

A. That's correct.

Q. What does that equal approximately in dollars?

A. $117,250.

Q. So if you were able to get Human Services Plaza Partnership to somehow agree to pay half a percent over Huntington's normal three-quarters percent charge, you would get to get that money; correct?

A. That's my understanding, yes.

Q. Now, when I say "you," is that you Tony Caruso, or

would have a chance to meet or beat any offer that came on the table.

Q. And to the best of your knowledge was Mr. Shanker showing you what your competitors were offering?

A. Yes, I think he was.

Q. Did you tell Mr. Shanker if he wanted the letter of credit, that he would have to use the placement services of Mr. Whitman?

A. Yes, I did.

Q. Did you assist Mr. Owen in preparing the budgets that were used in the appraisal and for Huntington's review purposes?

A. Yes, I had input into those.

Q. In fact didn't Mr. Owen come to your office with his computer and the two of you worked on those budgets together?

A. Yes.

Q. Did you knowingly take Human Service Plaza Partnership out of the financing market at a critical time in their financing schedule?

A. We knowingly took them out of the market.

THE COURT: Read that last question and answer, please.

(Record read.)

BY MR. KAHN:

Q. Did you assist Mr. Shanker in filling out his financial statement?

A. No.

Q. Did you tell -- did you and Mr. Whitman tell Howard Shanker and David Owen that there would be no problem selling the bonds?

A. Yes, we did.

Q. Did you authorize demolition of the gas station?

A. Yes.

Q. Did the bonds require Huntington National Bank letter of credit in order to be sold?

A. The way they were structured they did require that letter.

Q. Did you know that the East 18th and Chester building -- that's the $600,000 loan could only be afforded by Mr. Shanker if the larger project was funded?

A. Yes.

Q. Did you tell Howard Shanker that the bonds were sold?

A. Did I?

Q. Yes.

Q. Or if not you, do you know if Tom Whitman did?

A. I don,t recall that I did, and I don't know what Tom may have told them.

BY MR. KAHN:

Q. Mr. Caruso, I would like you to open your exhibit book, please, to Exhibit Number 10. I believe the jury has Exhibit 10.

Can you identify Exhibit 10, please?

A. Exhibit 10 is a commercial loan facility request for $23,500,000 letter of credit. The borrower is the Human Services Plaza Partnership.

Q. Okay. And did you fill this document out?

A. Yes.

Q. Is it fair to say you were the preparer of this document?

A. Yes.

Q. I'd like to walk through the document and find out where you got certain information. First off, where was the letter of credit fee of one percent, where did that information come from?

A. The letter of credit fee of one percent was Huntington Bank's stated fee for issuing letters of credit independent of placement fees. It was just an annual fee of one percent for the privilege of having a letter of credit.

Q. Where it says "maturity," on the first page, how did you arrive at the 78 months?

A. That was a combination of a period of 18 months to

construct the building and 60 months which was the initial period of the county lease.

Q. And did the partnership agree to that number?

A. Yes.

Q. Now, let's look at the purpose of the letter of credit. This indicates it is to support the placement of 78 month seven-day adjustable rate grantor certificates to be sold by corporate finance department. Where did you get that information?

A. That information was from my discussions with the partnership to date.

Q. All right.

A. And my agreement with Tom Whitman.

Q. Okay. And I'd like to know, I'd like to draw your attention, first off, to this -- there is some handwritten information down where it says comments, first page, about two-thirds of the way down, right-hand side and there is some handwritten notes that say, "Subject to selling $15,500,000 part in the L.C."?

A. Um-hum.

Q. Did you put that on there when this form was originally drafted?

A. No.

Q. Is that your handwriting?

A. No.

Q. Do you know when that would have been put on there?

A. I think it was put on at the committee approval process.

Q. Okay. And I'd like to know down here in the lower right-hand corner, do you know whose signatures these are down in the lowest lines?

A. The only one I recognize is the first one on the left which is Carl Alderman.

Q. Okay. And he would have signed this on 12/12/88?

A. Yes.

Q. Mr. Caruso, I'd like to draw your attention, please, to the second page. It says project economics. Who prepared that?

A. I did.

Q. Okay. Can you tell us the basis, please, of where you came up with each of these figures; for instance the first figure, land, 2.1 million?

A. That was the -- that was the value of the assembled site. And I believe it was also the agreed price that the partnership was to pay for the land.

Q. Okay. That would be a combination of the $825,000 loan and approximately a million-two that Mr. Shanker was going to get from the partnership?

A. I believe I recall that's correct, yes.

problem on the Edified transaction.

And I want to know if you ever had a meeting with the partnership subsequent to that missed document review session?

A. As I recall we had a meeting the following Monday which was around the 12th or 13th.

Q. Okay. And did you tell them that the meeting was missed because you had a problem with another deal?

A. Did I tell that to the partners?

Q. Yes.

A. Yes.

Q. Did you assure them that their.deal was unaffected by your problem on the other deal?

A. I think I did, yes.

Q. Did you tell them that things were going as planned and there would be no problem?

A. I don't know if I used those precise words, but I still encouraged them and reassured them that we would be able to meet the deadlines that we had imposed on the transaction.

Q. Okay. And when you say "imposed on the transaction," are you familiar that on or about November 28th a transaction time schedule had been sent out to the partners?

A. Yes.

Q. Is that the schedule you are talking about, if you recall?

A. I -- I think that's the one. We only had one schedule, from what I recall.

Q. I'd like you maybe to take a look and see if this will refresh your memory.

Mr. Caruso, as of that meeting is it a fair statement to make that you still wanted the deal to go forward on the MORANs with the partnership?

A. Yes, very definitely.

Q. Were you aware of any issues that would have prevented the letter of credit from issuing as previously planned?

A. Issues as to what?

Q. Well, as to any objections with whether or not the transaction had been properly structured to your satisfaction.

A. As far as I was concerned, and I believe as far as the partners were concerned, the transaction was properly structured in a position that we all agreed with.

Q. On or about December 12th, 1988 do you recall having a telephone conference with Mr. Tom Whitman wherein you advised Mr. Whitman that this was a go-ahead deal?

A. Yes.

Q. Can you take a look at number, Exhibit Number 46,

please?

MR. MARKUS: 46?

MR. KAHN: Exhibit 46.

MR. MARKUS: Thank you.

BY MR. KAHN:

Q. I will perhaps take a look at your exhibit. Mine is missing.

Do you recall any other conversations you had with Mr. Whitman on that day?

A. As I recall I just told Tom that the transaction was still going to proceed; to complete -- to go ahead with whatever the next.phase of the schedule was.

THE COURT: The date again?

MR. KAHN: 12/12/88.

BY MR. KAHN:

Q. Did you express similar sentiments to the partnership?

A. Yes.

Q. Mr. Caruso, you indicated that you had a meeting with the partnership on 12/12. Can you tell the jury where that-meeting was?

A. That was at Howard's office at 16th and Superior.

Q. Okay. And do you recall approximately when in the day that was?

A. When in the day?

Q. Yes.

A. It was after the bank closed, so it was approximately 5:00 o'clock.

Q. Now, on 12/15, December 15th, do you remember having a conversation with Tom Whitman expressing to him that progress with Mr. Emmons had been accomplished?

A. Yes.

Q. In fact, on or about December 15th was there a meeting held with the following members of the senior loan committee: Mr. Emmons, Mr. Brooks, and Mr. Williams, and other people there, Mr. Randolph and Mr. Buxton, wherein this particular project was discussed, either by telephone conference or in face-to-face meeting?

A. There was a meeting. As I recall it was by telephone conference.

Q. Okay. And at that meeting isn't it true that two issues were brought up; that these members of the senior loan committee wanted to see a construction manager and possibly personal guarantees?

A. I recall that that's true, Yes.

Q. And is that what you are referring to when you called Mr. Whitman and told him that the progress with Emmons had been accomplished?

THE COURT: Where are you finding that on the page?

for financing?

A. I don't recall whether I know that or not.

Q. Well, do you remember -- on page 159 in his deposition -- I asked the question: "Do you know whether or not Mr. Whitman was telling the partnership in early December, approximately December 6th, they should be looking for other alternatives?"

And your answer was "I don't know that he ever said that when I was around.

Q. "Question: Would that surprise you?

"Answer: I guess it would."

Do you recall that testimony?

A. Yes, I do.

Q. So at least at the time of your deposition it would have surprised you that Mr. Whitman would have told them something like that in early December; correct?

A. That's correct.

Q. In fact in early December did you have any reason whatsoever to believe that this transaction was not going go forward?

A. None whatsoever.

Q. In fact on or about December 6th, 1988 isn't that when all the documentation was delivered to the partners?

A. Yes, I think so.

Q. I'd like to have you open the book, please, to

Exhibit Number 48. Can you identify what that exhibit is, please?

A. It appears to be a draft copy of the indenture agreement on this particular transaction.

Q. Can you go and -- is that one of the documents, as you understand, that was forwarded to the partners?

A. Yes.

Q. Can you go to Exhibit Number 49, please? Can you identify that exhibit, please?

A. It's a draft of the advisory and placement agreement for the transaction.

Q. And do you know if that was one of the documents that was sent to the partners?

A. It was in the package.

Q. Can you identify Exhibit 50, please?

A. Yes, it's a remarketing agreement on this transaction.

Q. And do you know if that was sent to the partners?

A. Yes.

Q. And can you identify exhibit 51, please?

A. This was a summary of terms on the transaction.

Q. Do you know if that was sent to the partners?

A. Yes, it was.

Q. Can,you identify Exhibit Number 52?

A. Well, it is another copy of the remarketing agreement

APPENDIX Z

Excerpts from the Testimony of Roger Buxton

Q. I see Mr. Caruso purports to fill it out on or about the 6th. Do you recall when you would have filled it out, when you got involved, when you put your name on here?

A. I don't recall specifically when I initialed it.

Q. It would have been after the 6th; correct?

A. I'm sorry, I didn't hear that.

Q. It would have been after the 6th?

A. Correct.

Q. Correct. All right. Now, it would have been probably closer to around the 15th or so or 16th that you actually signed this document?

A. I don't recall when I signed it, no.

Q. Well, did you add anything to the document after Mr. Caruso had filled it out?

A. Yes.

Q. Okay. So Mr. Caruso had filled this document out first, then you subsequently modified it; correct?

A. Subsequently, correct.

Q. When was that?

A. Credit policy exceptions, and that is the heading where we have continued covenants and conditions under the loan agreement.

Q. Okay.

A. Paragraph four, construction manager acceptable to HNB was added after Tony prepared this facility request.

And then the handwritten note "subject to selling fifteen-five participants in the LC," that would have been done on the 19th during the senior loan committee presentation.

Q. Okay. So you modified this on or about the 15th or 16th, before it went down to Columbus; correct?

A. I believe we added paragraph four on around those dates.

Q. Okay. And up until about the 15th or 16th you didn't have any knowledge of the requirement of the construction manager; correct?

A. No, that was developed during the conference call with George Emmons and Bill Randolph.

Q. Okay. Now --

THE COURT: I'm not clear. When you referred to paragraph four, what you are referring to? Could you tell us, please?

THE WITNESS: The requirement for the construction manager.

THE COURT: Item four?

THE WITNESS: Item four, yes, sir.

THE COURT: All right. Thank you.

BY MR. KAHN:

Q. Now, the week of the 14th to the 16th of December, at this point in time you had a meeting with Mr. Emmons,

A. No.

Q. What was the conversation with respect to the title company?

A. We wanted the opportunity to review the financial statements of, I believe it was, Surety Title Insurance Company which was Stewart Title. They were headquartered in Texas. Because of the series of bank failures in that marketplace, we wanted an opportunity to review their statements, and that's not unusual, and we also wanted to know what kind of reinsurance program that they would enter into with other title insurance companies and who they would be.

Q. But the partnership wasn't disagreeing with allowing you to do that, were they?

A. No.

Q. Now, in fact you were advising Mr. Shanker at around this time in late -- or mid-December, December 16th or so, that there would be some additional requirements that the bank would impose, and that one of them, the most significant one, was the construction manager; correct?

A. That was the only condition that we added to the facility request.

Q. Okay. And you indicated that Mr. Shanker at or about that time one way or another agreed to the condition; correct?

A. Yes.

Q. Now, prior to December 19th, 1988, there was no indication by yourself or anyone else involved in this deal that there would be a requirement of participants, was there?

A. Not as far as I was concerned.

Q. Okay. So is it a fair statement to say that the first time the requirement for participants arose, was on or after December 19th, 1988?

A. It was the first time that I had heard it.

Q. When you reviewed this transaction, prior to it going to Columbus on the 19th, were you of the opinion that it was a very strong and well-written loan or underwritten loan? Let me rephrase that; I stated it poorly.
Were you of the opinion it was a very strong and well underwritten loan?

A. I recommended the credit. The purpose of the presentation, among other things, is to examine the risks that are inherent with a particular credit, but also then to provide ways to abate that, those risk issues.

Q. Okay.

A. And I thought that we had done that.

Q. Okay. In fact on the 16th of December you were confident that the bank could finance this transaction; correct?

A. I'm not sure that I was -- personally I was confident that we would -- we would have an approval.

Q. Okay. And in fact did you communicate that to Mr. Shanker, that you were confident that this transaction would get approval?

A. I don't recall?

Q. Isn't it a fair statement to say that on December 16th that you felt that you and Mr. Shanker had a meeting of the minds with respect to this transaction?

A. As far as the terms and conditions of what we were going to present, we had a meeting of the minds, that's correct.

Q. Is it also fair that it was your impression that up until the 19th of December, that the partnership had dealt in good faith with Huntington?

A. That's correct.

Q. And that you were comfortable with the way they were dealing with Huntington?

A. Correct.

Q. And isn't it fair that when I say "good faith," that your understanding of good faith is acting in a manner consistent with verbal understandings?

A. I'm not sure I understand that question.

Q. Okay. Do you remember on page 20 of your deposition I asked, "What is your understanding of the phrase good

Mr. Owen and Mr. Shanker. We reviewed the whole presentation and the terms on the 16th of December.

Q. Okay. So then by the 21st of December or right after the participation requirement was put on, you wouldn't have had any,reason to believe he would have objected prior to that, do you?

A. Objected to what?

Q. Well, on December -- you are saying December 16th that he basically agreed to a construction manager; correct? You had a meeting of the minds with him?

A. I believe so.

Q. And the first time you learned about the participation requirement would have been on the 19th; correct?

A. Correct.

Q. And at that point within a day or so after that he, as you put it I think, you know, was agitated, was that the phrase you used?

A. I believe so.

Q. So that was within a couple days of him finding out about the requirement for participants, correct, and you advised Mr. Randolph about that within that time, shortly thereafter?

A. I think when, Mr. Shanker called back after the conversation on the 19th he raised objections to the

APPENDIX AA

Excerpts from the Testimony of Thomas Whitman

multi-option notes, yes, sir.

Q. Okay. And, now, you keep referring to the multi-option notes. Do you recall that originally this document had attached to it a proposal for a terminator transaction, do you recall that?

A. Yes, sir. That would be a multi-option note with --

Q. So then if we were to use multi-option note for a terminator and multi-option note for MORAN, they would both be correct phrases; correct?

A. That's correct, sir.

Q. So then this engagement anticipated -- didn't matter whether it was a MORAN transaction or a terminator transaction; you were employed as the agent to place those notes, correct?

A. I would not say that, sir, no.

Q. Well, what would you say?

A. That it would matter whether it was the terminating letter of credit structure or, as you refer to it, the MORAN structure.

Q. Okay. Why would it matter?

A. They are -- it's a different type of a transaction.

Q. Was it your understanding that Human Services Plaza Partnership retained your services to place the MORAN notes?

A. Yes, sir.

Q. And in fact even though this document doesn't expressly state that, this document was signed under the terms of the terminator transaction; correct?

A. I don't know, and it was signed on the 23rd. I don't know at what point they signed it.

Q. Okay. Well, on the 23rd what were the partners going with?

A. At that point we were switching to the MORAN transaction.

Q. And even though the attachments that may have existed with this at the time showed terminator, you had a verbal understanding with the partnership that you were going to be placing the MORAN notes; correct?

A. We were under the understanding that the partnership wanted to proceed with a MORAN type transaction.

Q. Okay. And that was verbal, wasn't it?

A. That was based on phone conversation, yes, sir.

Q. So it was a verbal understanding; correct?

A. Yes, sir.

Q. And you went out and actually attempted to place the MORAN notes; correct?

A. Yes, I did.

Q. And it was based solely on a verbal understanding; correct?

A. Yes, sir.

tens of millions of dollars -- well, maybe not every day but as a regular --

A. I wish I did.

Q. Let me rephrase that then. Isn't it a fair statement that as a regular course of your business you get verbal commitments to purchase millions and millions of dollars' worth of transactions?

A. We get verbal indications that people will take the transactions.

Q. And in fact don't you give verbal indications back that you will provide what you are talking with the person about?

A. Yes, that we are planning on delivering securities.

Q. Okay.

A. When and if available.

Q. I'm sorry?

A. When and if available.

Q. And in fact didn't you contact a company known as Federated Research in this transaction?

A. Federated Research Corp., yes, sir.

Q. Of Pittsburgh?

A. Yes, sir.

Q. And in fact didn't you tell the partners that Federated agreed to purchase the multi-option notes?

A. Yes, Federated had indicated that they would take

the notes.

Q. Okay. Now, and after Federated had agreed to take those notes, now do you recall that that was approximately the end of November?

A. Yes, sir.

Q. Okay. And subsequent to that Huntington had put on a condition for participants; correct?

A. In the letter of credit.

Q. Yes.

A. Yes, sir.

Q. Okay. After their requirement for participants you went out and were,looking for letter of credit participants; correct?

A. Yes.

Q. Didn't you feel -- you couldn't, as a matter of professional obligation you couldn't in good faith sell those multi-option adjustable rate notes to someone else if you had gotten participants; correct? You had to offer them to Federated?

A. I would have, yes, sir.

Q. And that's because you promised them you would?

A. I don't know if I promised them I would, no, sir.

Q. Did they circle the transaction?

A. Yes, sir.

Q. Would it have been your expectation for once an

investor circled a transaction, that means they told you they circled the funds; right?

A. That's close enough, yes, sir.

Q. Okay. Is it your understanding that once they circle those funds, that you would be professionally, on a professional and ethical basis, allowed to go out and sell the same transaction to someone else and tell Federated forget it?

A. No, sir. I would go right back to Federated when and if I had the notes for sale.

Q. Right. Now, Federated had indicated to you also, didn't they, that with respect to the pricing on the seven-day notes they were going to expect the higher of 30 or 90-day commercial paper; correct?

A. That's correct.

Q. And did you tell that to Human Services Plaza Partnership?

A. I -- yes.

Q. Can you open your exhibit book to Exhibit 42, please? Can you identify that, please?

A. Yes, that appears to be a part of a telephone message slip with my handwriting on it.

Q. Can you read that to the jury?

A. Yes. In the top corner it's dated 11/23/88, and the basic I can message is, "Go with seven-day MORANs now."

Q. Now, there is a Bates stamp number on the bottom of this document; correct?

A. Yes, there is.

Q. And I'll represent to you that the Bates stamp numbers that don't have HSPP in front of them were documents that were produced by your attorneys. Do you know if this came out of your file?

A. I believe that it did.

Q. Okay. And is it a fair assumption that since this was produced to us with respect to this case, this little note here is referring to the transaction between Human Services Plaza Partnership and Huntington Company?

MR. MARKUS: Objection.

THE COURT: Overruled. You may answer the question if you understand it.

A. Would you repeat it, please?

THE COURT: Read it, Sue.

(Record read.)

A. Yes, I believe that would be a fair assumption.

Q. And based on this, do you know who was on the other end of the telephone or was this a face-to-face meeting? How did this message come to be?

A. I don't recall precisely.

Q. Was it your understanding when you received that, that you were supposed to go with the MORAN transaction on

behalf of Human Service-Plaza Partnership?

A. With the initial seven-day rate, yes.

Q. And was it your understanding that this was that you were no longer proceeding on the terminator transaction; now you were being authorized to go on the MORAN transaction?

A. No.

Q. Were you still doing both?

A. Yes.

Q. Okay. And that's because if you found a favorable rate under the terminator transaction, you would have presented that; correct?

A. That was my understanding that that was the desire of the partnership, to continue to explore the terminator transaction concurrent with the seven-day weekly rate MORANs transaction.

Q. Okay. And on about when you reported that Federated committed to buy the notes, isn't that the same time that we started the legal documentation on the MORAN transaction?

A. Federated circled the notes.

Q. Right.

A. You used the word "committed." I would not use the word "committed." They circled the notes.

Q. You agreed to the term "sold," didn't you?

A. I'm sorry, sir? What?

Q. With respect to Federated?

A. I used the what?

Q. Go back to that. Didn't you in fact tell the partnership that Federated agreed to purchase the multi-option notes?

MR. MARKUS: Excuse me, what are we -- is this from deposition?

MR. KAHN: I'm asking the question first. If I don't need the deposition --

THE COURT: It looks like you are looking at something.

MR. KAHN: I am. I'm looking at my typewritten notes.

MR. MARKUS: I object.

THE COURT: Oh, well, then the jury will understand he is not reading from the deposition. You can put the question and certainly use your own notes to ask him.

(Record read.)

A. Yes, I believe I had indicated to the partnership that Federated had agreed that they would take the notes, and that's what I referred to as a circle.

BY MR. KAHN:

Q. Take a look at volume three, page 14. Now, I will

A. Yes.

Q. So is it fair to say then that as of the 19th you were advising them to go seek other lenders?

A. Again I believe that's very consistent with what I just said.

Q. Well, checking other opportunities isn't exactly the same as advising. You were still their financial advisor; right?

A. Um-hum.

Q. And you were providing the advice to go to another lender?

A. We were financial advisor related to the structuring, negotiating and private placement of those notes, pure and simple.

Q. Um-hum.

A. And when asked, we did advise the client that he was free to pursue other opportunities, and when asked we told is him I would encourage him to pursue other opportunities.

Q. And that's because --

A. But we were not telling him to go seek other lenders --

Q. Did he --

A. -- in the meaning that, "Get out of the Huntington Bank; go seek other lenders."

Q. Well, the other lenders you were referring to in the

without participants; correct?

A. We anticipated that Huntington National Bank would be the letter of credit bank.

Q. Did either you or the partnership have any reason to believe that something other than that would occur?

A. No.

Q. Now, please take a look at Exhibit Number 141. Can you identify that for the jury?

A. It would appear to be a summary of proposed terms for multi-option adjustable rate note for Human Services Plaza.

Q. Pardon me?

A. For Human Services Plaza Partnership.

Q. Okay. And on this summary of terms, there is a is listing for letter of credit. Can you read what's across from the letter of credit, please?

A. "Will be issued by the Huntington National Bank, the bank, and will secure the payment of all principal notes plus up to 45 days' interest thereon and will expire on January 15th, 1994 unless sooner terminated. The letter of credit will be issued pursuant to a reimbursement agreement between the bank and the company, the reimbursement agreement."

Q. Mr. Whitman, was it anticipated you would be the placement agent on that transaction?

A. Yes, it was.

Q. Would you read to the jury who the placement agent was on this document?

A. It states it would be the Huntington National Bank.

Q. Okay. Now, so the Huntington National Bank, you are representing, is going to be the placement agent; is that correct?

A. That's what was listed here, yes.

Q. Now

MR. MARKUS: If the Court please, may I have a side bar, please?

THE COURT: Okay.

(At side bar out of the hearing of the jury:)

MR. MARKUS: At least thus far there has is been no foundation to suggest that this witness sent this document anywhere. I would also point out the document begins in its first paragraph with the solid capital letter notation, "The terms of the transaction are subject to change, and this summary does not constitute an offer to sell or the solicitation of an offer to buy any of the notes. An offer may be made only with the private placement memorandum."

I have no demonstration yet as to what the document is. Someone had prepared the document and I have some suspicions as to who did. I don't know whether this

witness was involved or not.

MR. KAHN: I think --

THE COURT: The foundation has not been laid.

MR. KAHN: I'll lay the foundation.

THE COURT: Pardon me?

MR. KAHN: I believe he testified in his deposition. I can ask him the questions.

THE COURT: Directly have you tied this in? I don't think so. You better do that, describe what he said so far.

(End of bench conference.)

THE COURT: Any question relating to 141 and the answers given thereto are to be stricken at this point until it's in some way shown that Mr. Whitman has some knowledge of it.

MR. KAHN: Your Honor, could we ask that before they are -- I don't have to reask all the questions again, though, do I?

THE COURT: No, they will stay in and if you are able to tie it in with Mr. Whitman then I will so inform the jury.

MR. KAHN: okay.

THE COURT: For the moment I have to tell them they can't consider it.

BY MR. KAHN:

Q. Mr. Whitman, let's go back to this document. I'm sorry, Exhibit 141, the one you just read to the jury, who prepared that?

A. I believe that it was developed in my office. I believe I did.

Q. Okay. And in fact this is a summary of proposed terms for the multi-option adjustable rate note for Human Services Plaza; correct?

A. Yes, sir.

Q. And what was the purpose of that?

A. That was to lay out a summary of the proposed terms as we understood them at that time.

Q. Do you remember my asking you in your deposition what the purpose of that was?

A. I do not recall that at this moment.

Q. Okay. Well, at page 97 of volume three, line 15 -- are you there, Mr. Markus?

MR. MARKUS: Yes, thank you.

BY MR. KAHN:

Q. Okay. I asked the question, "Can you identify Exhibit 141, document number 102930 through and including 102942?

"Answer; This is a summary of proposed terms for multi-option notes for Human Services Plaza Partnership.

"Question: What was the purpose of that?

"Answer: I believe its purpose would have been to send to Federated and potentially others who would be interested in buying the notes as summary of proposed terms."

Do you recall that testimony?

A. I -- you are reading it. Yes.

Q. Okay. So is it a fair characterization that that document went out to Federated?

A. It may or may not have. I don't recall.

Q. The purpose of the document was to be sent to Federated; correct?

A. It would have been to lay out the summary of proposed terms to be sent to potential investors, yes, including Federated.

Q. In fact you testified earlier that Federated got the bond documents that were being produced by the attorneys; correct?

A. I believe they may have. I am not positive whether or not they actually were forwarded on to Federated.

Q. Okay. You recall that you have handwritten notes indicating that you had talked to Steve Ward and that he had requested the documents, that you were --

A. Yes, I recall something in my notes relating to a conversation with Mr. Ward about where to send documents.

Q. Okay.

A. Which may or may not have been for this transaction.

Q. Do you recall that in your deposition I asked specifically, same page, line 23, "This is the document that would have gone out to those who are looking at the MORAN type transaction?

"Answer: I believe it would have been, yes; could have been."

Do you remember that?

A. Yes, sir.

Q. So?

A. That's

Q. At your deposition you were indicating, were you not, that this transaction did in fact go out to people who were looking at the MORAN transaction; correct?

A. I said I believe it did. I believe it could have.

Q. Well, "I believe it would have, yes?"

A. I believe it would have. I can't tell you absolutely for sure that this was sent to Federated. That's the purpose it would generally have, would be to go to investors.

Q. Okay.

THE COURT: The jury may now consider the previous testimony along with this line of questions.

19th?

A. That was the first time I remember finding out there was a need for participants.

Q. And by necessity, placing that need for participants upon first -- well, I'll rephrase it.

Isn't it a fact when the senior loan committee placed that requirement on this transaction, you could not deliver the transaction on time?

A. We could not close on December 30th, on or before December 30th. I did not believe that we could have done it.

Q. I'm sorry?

A. I do not believe that we could have accomplished that.

Q. In fact as a financial advisor, you wouldn't have advised Human Services Plaza Partnership to sign the commitment letter that came out on December 30th, isn't that a fair statement?

A. Given their time constraint that they wanted the deal to have closed on December 30th, no, I would not have said they should sign that letter if asked in that capacity.

Q. In fact, weren't you also concerned that had a demand in it for $50,000 due upon execution of the letter?

A. I believe that there was, yes

entire concept that Human Services Plaza Partnership and the Huntington were working on for months, it completely changed on December 19th?

A. No, I would not say it completely changed.

Q. Would it be a fair characterization to say it changed significantly?

A. Yes, I believe that it changed significantly.

Q. Would it also be fair to say that the requirement of placing participants as a condition of obtaining the letter of credit was a major change?

A. I would say it was a very significant change.

Q. wasn't it in fact a major change?

A. However you define major, I don't know how you would define major as different from significant.

Q. Substantial?

A. It was a substantial change.

Q. Material?

A. I don't know.

Q. Would you agree that placing that condition on the issuance of the letter of credit in late December had placed Human Services Plaza Partnership in the jackpot?

A. That was a reference that Mr. Shanker had made and I probably would not have disagreed with him at that time.

Q. In fact, you would define jackpot as placing him in quite a predicament; right?

A. I'm not sure if it was quite a predicament or bit of a predicament. In a predicament.

Q. Is it also fair to say that the commitment letters that issued December 30th and January 10th respectively, were substantially different than the business deal that was discussed with HSPP prior to December 19th?

A. There were substantial changes, primarily related to the need for participants in the letter of credit prior to the issuance of the letter of credit.

Q. Wasn't there also -- are you familiar that prior to, oh, let's say week of the 13th to the 15th of December, were the partners expecting to render personal guarantees with respect to this transaction?

A. I do not know.

Q. Isn't it a fact that the request for personal guarantees was requested just prior to December 19th?

A. I don't know if that was the first time they were requested or not.

MR. MARKUS: While he is looking may I press an objection for relevance?

THE COURT: Pardon me? Do you want the court reporter?

MR. MARKUS: I have only one word.

(At side bar out of the hearing of the jury:)

MR. MARKUS: Apparently plaintiff's counsel

to find participants?

A. I believe that may have taken anywhere from as short a 20 days, perhaps 45 days.

Q. Okay.

A. Perhaps shorter, I don't know.

Q. And if you had gotten participants, they may have wanted to change other parts of the deal, too; correct?

A. That's possible.

Q. In fact there is a possibility if you got participants they may want to change the lease with the county; correct?

A. I -- that's possible.

Q. That lease, do you understand, that was signed on December 19th; correct?

A. You would have to help me with the date that the lease was signed. I don't recall.

Q. I'll represent to you it was signed on December 19th.

A. Fine. Then it was signed on December 19th.

Q. So those potential participants would also have to be satisfied with the lease then; correct?

A. That would be correct, yes.

Q. Do your notes indicate to you that you had requested advance copies of the lease as early as the early part of November?

Q. And you were perfectly able to go out and sell 23 and a half million dollars' worth of bonds; correct?

A. We were able -- we were able to get an investor interested in the transaction and circle the transaction. I would not have been able to sell the notes and close the deal and have money wired in without a letter of credit.

Q. Well, let's take a look at 369. Is that something -- you get a commitment letter, you have the basic documents and everything reviewed -- they are not final after you get a letter of credit, are they, the documents to the bond buyer; correct?

A. That may or may -- that may happen simultaneously; it may not.

Q. Well, let's take a look at your schedule in 369. And on day -- I'll reference we are on Bates stamp 3063 and it shows on day 15 Huntington delivers letter of credit commitments to company for acceptance, and after that you have first drafts of basic documents?

A. That's correct.

Q. Correct?

A. Um-hum.

Q. And then you go to second drafts on day 36; right?

A. Um-hum.

Q. Those -- so that's showing that you are still out there doing documents after you have the letter of credit;

right?

A. The commitment on a letter of credit. Letter of credit document itself is part of the basic documents.

Q. Okay. So then you have a commitment on something that doesn't yet exist, right; the letter of credit?

A. Commitment on what?

Q. On a letter of credit.

A. You have a commitment letter to issue a letter of credit.

Q. Right.

A. Yeah.

Q. And that letter of credit hasn't been drawn yet, has it?

A. The letter of credit has not been executed, that's correct, sir.

Q. Then and after you have the commitment, you go through and you look at these basic documents, one of which would be the letter of credit; correct?

A. That would be correct.

Q. And the people still make changes and negotiate what terms and conditions go in that letter; correct?

A. That would be typical.

Q. That's correct, it would be typical. Even though there is a commitment on it, the documents still have to be modified; correct?

A. Typically, there are negotiations on the documents, yes.

Q. And they are reviewed by both sides; right?

A. Typically, they would be reviewed by all sides.

Q. And second drafts are exchanged anticipating changes; correct?

A. Typically.

Q. And eventually it's executed; correct?

A. Hopefully.

Q. And that doesn't change the nature of the initial commitment, does it?

A. I think that the final documents, when executed, become the embodiment of the agreement.

MR. KAHN: Thank you.

THE COURT: Okay. Very well, Mr. Whitman. You are --

MR. MARKUS: May I ask one question?

THE COURT: Only one.

MR. MARKUS: That's all, I only have one, I promise.

- - - - -

FURTHER REDIRECT EXAMINATION

BY MR. MARKUS:

Q. Mr. Kahn asked in this last series of questions whether there is anything in-Exhibit D-138 that relates to

APPENDIX AB

Excerpts from the Testimony of Carlton Hill

documents together do you have an opinion as to the extent of the authority as being granted pursuant to that loan committee -- both the Exhibit 6 loan facility request and approval, and the committeement letter, Exhibit Number D-45?

A. Well, it would appear that that -- that the loan committee realized that they were looking at an ultimate 20 million dollar credit; that the 825 was the first peg of this, of this long-term credit. Since the bank approved the 825 and gave Mr. Caruso the authority to negotiate the 825, it also in effect approved the ultimate 20 million dollar credit simply because you don't loan money to build something that you aren't going to -- unless you are going to have the ultimate in order to collect the payment and get paid off.

I mean, that you can build, but -unless there is something that -- you can give them the money to buy the property, but unless you give him the money to build the building and turn around and lease it, there is no way that 825 could have been paid off. So in a sense the bank has already authorized and agreed to a 20 million dollar operation.

They had to do -- they had to do the whole package or they were stuck with a loan of $825,000, because in this June 29th letter it's a six month loan but there is no way

THE COURT: The latter part goes out because he's assuming that there was that, and therefore the answer goes out. He has no authority to indicate that. That's for the jury to decide.

BY MR. KAHN:

Q. Do you have an opinion as to how significant requiring of participants at this date, if you assume I'll first lay a basis.

If you assume that the partnership wanted to close this transaction by year end or -- no -- or the first part of February even, of 1989, and on or about December 19th the senior loan committee or the Huntington National Bank placed a condition of requiring participants on this transaction, how significant of a condition is that?

A. It's a major alteration of the previous loan approvals and the previous discussions the bank has had with the borrowing customer. This has changed the is groundrules, in other words. Never before did they realize that this was -- that this was even in the works.

Q. Would this --

A. It's too late to change horses in the middle of a stream.

Q. Is this the type of a condition that you would categorize, that you spoke about before with respect to the fine-tuning of the documents?

A. No, this is a whole different covenant in the loan approval and the loan agreement. The fine-tuning of the documents would be the final documents that came in, the lease and that type of document.

This, you have put in a whole different ballgame into the situation.

Now, you have put in covenants in there that if they don't sell those bonds, I mean the participation, 15 million, they aren't going to do it.

Q. I'd like you to take a look now, if you would, at Exhibit Number 17. Have you had an opportunity -- you have seen this document before; true?

A. Yes, sir, I have.

Q. And I want to draw your attention specifically to page four, paragraph one.

THE COURT: Mr. Kahn, just a few minutes, please. I want to talk to Vickie and I would ask the lawyers to come over. We don't need the court reporter.

(Side bar conference had off the record.)

THE COURT: Go ahead.

BY MR. KAHN:

Q.I draw your attention specifically to paragraph one on page four and paragraph 28 on page ten.

THE COURT: In which document again?

MR. KAHN: This is Exhibit Number 17.

Supreme Court, U.S.
FILED
SEP 6 1996
CLERK

NO. 96-303

In The

Supreme Court of The United States

October Term 1995

HUMAN SERVICES PLAZA PARTNERSHIP,
Petitioner,

v.

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON MORTGAGE COMPANY;
THE HUNTINGTON COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD M. MARKUS
COUNSEL OF RECORD
JEFFREY BADDELEY
PORTER, WRIGHT, MORRIS & ARTHUR
1700 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115
(216) 443-9000
Attorneys for Respondents

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QUESTIONS PRESENTED

1. Whether the courts below correctly applied Ohio law to reject the petitioner's contract and promissory estoppel claims, where (a) no evidence showed that the respondent bank held the purported agent out as possessing authority to set terms and commit the bank for a 78 month $23,500,000 letter of credit; (b) undisputed evidence established that the petitioner had no good faith reason to believe the purported agent had such authority; (c) Ohio's statutes of frauds preclude enforcement of any such oral promise, and (d) the petitioner failed to complain seasonably about any claimed procedural complications.

2. Whether the district court properly exercised its discretion when it declined to receive opinion evidence that an "entireties clause" was an "unusual banking practice" which allegedly violated tying restrictions in the Bank Holding Company Act, where (a) the petitioner's pleading made no such claim, (b) no evidence showed that the "entireties clause" was anticompetitive conduct, which is an essential element of a Bank Holding Act claim, and (c) the "entireties clause" imposed no meaningful burden by discouraging a legally meritless claim.

3. Whether the Ohio law of damages established alternative grounds for affirmance.

4. Whether the district court should have ruled on the respondents' alternative motion for a partial new trial.

CORPORATE PARTIES

The respondents are the Huntington National Bank (a traditional full service bank), the Huntington Mortgage Company (a commercial project mortgage lending company), and the Huntington Company (an investment banking company). These three respondents are each wholly owned subsidiaries of Huntington Bancshares, Inc. (a publicly traded bank holding company), which is not a party to this case.

STATEMENT OF THE CASE

Ohio law controls most of the substantive issues in this case. A jury rejected the only federal claim that the district court submitted for their consideration. The petitioner misreads the rulings below, and proposes a new version of the evidence, in an attempt to suggest that some unresolved but pervasive issues require review. In fact, this is basically a garden variety state law contract case.

1. The Contract Claim

Most of the proceedings below centered on the petitioner's claim under Ohio law that the respondent bank breached an oral commitment to sell the petitioner a 78 month $23,500,000 letter of credit.

Applying Ohio substantive law for this supplemental jurisdiction claim, both the district court and the court of appeals ruled as a matter of law that the purported agent lacked actual or apparent authority to make such an extravagant oral commitment. See *Shaffer v. Maier*, 68 Ohio St. 3d 416, 627 N.E.2d 986 (1994); *Master Consolidated Corp. v. BancOhio National Bank*, 61 Ohio St. 3d 570, 575 N.E.2d 817 (1991).

No evidence showed that the respondent bank held the purported agent out as possessing authority to set the terms or commit the respondent bank for a 78 month $23,500,000 letter of credit. Undisputed evidence denied that the petitioner had a good faith reason to believe the purported agent had such authority.

2. The Promissory Estoppel Claim

Ohio law also precludes a promissory estoppel claim when the purported agent lacked actual or apparent authority to make the disputed promise. *Master Consolidated*, 61 Ohio St. 3d 570, 575 N.E. 2d 817 (1991). No evidence demonstrated that the

agent had actual authority. Petitioner relied on the agent's apparent authority. As the petitioner correctly stated in its appeals court brief at pp. 43-44:

> . . .in order for the jury to have found apparent authority in Count II [the contract claim], it, by necessity, had to have found good faith and reliance by HSPP [the petitioner partnership]. The same test is used for both apparent authority and promissory estoppel. In fact, apparent authority is an estoppel issue.

Accordingly, the rulings below that the evidence failed to show apparent authority disposed of both the contract claim and the promissory estoppel claim.

Moreover, the petitioner repeatedly waived any complaint about the verdict which denied its promissory estoppel claim:

a. The petitioner asserted no objection when the district court instructed the jury that the petitioner's promissory estoppel claim requires proof that the Huntington Mortgage Company official had apparent authority to promise the requested letter of credit (See Fed. R. Civ. Proc. 51);

b. With the petitioner's express agreement, the district court submitted the promissory estoppel claim as an alternative to the contract claim with a lesser measure of damages, if and only if the jury rejected the contract claim. When the jury approved the petitioner's contract claim, they followed the instructions which the petitioner expressly approved, by finding against the petitioner on the promissory estoppel claim;

c. The petitioner made no motion, suggestion or argument regarding its promissory estoppel claim when it

responded to the respondents' post-trial motion for judgment as a matter of law on the petitioner's contract claim;

d. The petitioner later asked the appeals court to reinstate the jury's contract verdict as an award on its promissory estoppel claim, even though Ohio measures the damages for the two claims differently, and never sought a new trial on its promissory estoppel claim.

3. Four Statutes of Frauds

Ohio's statutes of frauds precluded judicial enforcement of the alleged oral contract which supposedly required the bank to provide a letter of credit which would (a) guarantee the petitioner partnership's debt to bond purchasers, (b) for 78 months, (c) for annual payments that exceed $5,000, (d) with a mortgage on land as security. See Ohio Rev. Code §§1301.12(A), 1335.05; 1775.11. The alleged oral contract would guarantee another's debt, could not be performed within one year, would sell intangible property for more than Ohio's limit on oral sales, and would affect an interest in land.

In the trial court, the petitioner partnership argued that none of these statutes govern this transaction, or that some writing somehow satisfied these statutory requirements. The 3774 page trial transcript contains one sentence in which petitioner's counsel argued that some undefined partial performance might satisfy the statute which precludes oral "real estate transactions." Otherwise, the petitioner never mentioned "partial performance" in any trial court pleading or any trial court brief, not even its response to the respondents' post-trial motion on the statute of frauds issue.

In the court of appeals, the petitioner argued for the first time that the petitioner satified all statutes of frauds by its "partial performance" of its project. The petitioner contended that it

could enforce a November oral commitment for a 78 month $23,500,000 letter of credit because the bank loaned it $825,000 in July to acquire part of the land for its project. The petitioner has not cited any Ohio case law for the extraordinary contention that making one loan in July is part performance of a promise in November to perform another transaction. The appeals court simply declined to consider this argument because it first surfaced on appeal.

The courts below focused on the Ohio statute of frauds which bars enforcement for oral contracts that cannot be performed within one year. They did not reach the bank's contentions that three other Ohio statutory provisions also render this alleged oral contract uneforceable.

4. The Federal Tying Claims

After multiple amendments, the petitioner's Complaint ultimately included a claim that the respondents violated tying restrictions in the federal Bank Holding Company Act (12 U.S.C. §1972) by requiring four specific conditions for the petitioner's loan transactions. The district court's rulings pared those four tying claims down to one for the jury's consideration, and the petitioner never appealed those rulings.

The tying claim which the district court submitted to the jury alleged that the Huntington National Bank conditioned its potential letter of credit transaction on the petitioner's agreement to employ the Huntington Company for related bond sales. The jury returned a verdict in the respondents' favor and against the petitioner on that tying claim. Further, the jury answered "No" to the court's interrogatory: "Do you find that the Huntington National Bank required HSPP [the petitioner partnership] to hire the Huntington Company in order to obtain a letter of credit from the Huntington National Bank?"

The petitioner's appeal from the district court's judgment did not complain about the district court's jury instructions for that tying claim, the jury's verdict on that claim, the jury's answer to the related interrogatory, or the district court's denial of the petitioner's post-trial motion for judgment as a matter of law on that tying claim.

Instead, the petitioner argued on appeal that the district court "dismissed" an additional tying claim by improperly excluding opinion evidence which might have supported that different claim. In fact, the petitioner never alleged that additional claim in its pleading and never sought or obtained leave to add that claim. The petitioner inartfully contends that the district court dismissed a non-existing claim.

As the court of appeals explained, the petitioner's real complaint is the district's ruling on opinion evidence which the petitioner proferred late in the trial to support a previously unpleaded tying claim. The petitoner wanted to assert that the bank should not have included an "entireties clause" in a formal loan commitment offer which the petitioner disfavored and never accepted. The allegedly unlawful paragraph provided:

> 28. This Commitment Letter constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof, superseding any and all negotiations and discussions between the parties. No other documents, instruments or similar written on [sic] verbal matters preceding the date hereof shall or may be used to vary or alter the provisions hereof.

The petitioner contended that terms in the bank's proposed Commitment Letter differed from the alleged prior oral commitment by the Huntington Mortgage Company officer. The petitioner further contended that the entireties clause effectively

"conditioned" the bank's formal Commitment Letter offer on the petitioner's release for any claim on the prior oral commitment.

The district court sustained the respondents' objection to the petitioner's expert's opinion that an "entireties clause" was "an unusual banking practice" for such a commitment letter. The petitioner apparently contends that the district court thereby abused its discretion because the proffered opinion somehow showed that the entireties clause violated tying restrictions in 28 U.S.C. §1972(1)(C):

> (1) A bank shall not in any manner extend credit . . . on the condition or requirement
>
> > (C) that the customer provide some additional property, or service to such bank, other than those related to and usually provided in connection with a loan . . .

The petitioner neither requested a jury instruction for this new tying claim, nor objected that the jury instructions omitted any reference to it. Following the trial, the petitioner made no motion for a new trial on the ground that the court rejected the proffered opinion or failed to submit the related claim for the jury's consideration. The petitioner's post-trial motion for judgment as a matter of law on its original tying claim made no reference to this new tying claim.

Contrary to the petitioner's brief in support of its petition for certiorari, neither the trial court nor the appeals court ever ruled that the petitioner's new tying claim failed because the transaction failed. While the petitioner's rejection of the bank's proposed transaction may arguably preclude the petitioner's claim that the bank "extended credit" on some unlawful condition, neither court below so held. Indeed, the district court submitted the petitioner's original tying claim to the jury, despite the fact that the transaction failed and the bank extended no credit.

The trial court rejected the proposed expert opinion without a detailed explanation and without a request by the petitioner for a more detailed explanation. The appeals court affirmed that evidentiary ruling on an abuse of discretion standard. The unstated reasons for the evidentiary ruling might well include the failure of the proffered opinion evidence to satisfy Evidence Rule 702, its lack of relevance to the pleaded issues, and its use to raise a prejudicially tardy claim.

Further, the district court repeatedly asked the petitioner to provide any authority for its claim that a bank cannot lawfully condition a customer's transaction on the resolution of any further controversy with that customer. Petitioner's counsel could not find a single case to support that contention.

Additionally, the court of appeals noted that the petitioner can hardly complain that the bank required the petitioner to release its claim on a supposed oral commitment, when the district court and the court of appeals have both held that any such claim lacks merit. Assuming *arguendo* that the bank could not lawfully condition a transaction on the customer's release of some valid claim against the bank, a condition that the customer release an invalid claim does not require "that the customer provide some additional property."

As the appeals court stated, the rulings that deny any legally cognizable oral promise render moot any contention that the release of a claim based on that supposed oral promise was an unlawful condition.

In any event, the exclusion of that evidence could not be prejudicial because no evidence showed that the allegedly unlawful condition had any anti-competitive affect. A condition for credit cannot violate the Bank Holding Company Act unless it hampers competition. *See Sanders v. First National Bank & Trust Co.*, 936 F.2d 273, 278 (6th Cir. 1991); *see also Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984); *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 679 F.2d 242 (11th Cir. 1982).

5. The Judicial Review Process

The petitioner obtained a favorable verdict on its contract claim that the Huntington National Bank declined to sell the petitioner a 78 month $23,500,000 letter of credit on the petitioner's terms, pursuant to a supposed oral commitment by a Huntington Mortgage Company official.

Thereafter, the district court's fifty-three page opinion and order granted the respondents' post-trial motion for judgment on that Ohio contract claim. In its opinion, the district court ruled as a matter of law that the petitioner failed to show the purported agent's authority for the alleged commitment, and that Ohio's statute of frauds rendered the alleged oral contract unenforceable.

At that time, the district court judge had more than fifty years experience as an Ohio state and federal court judge. As all trial counsel noted, the judge took exceptionally meticulous notes during the trial. As his rulings on the post-trial motions impressively demonstrate, he studied those notes and the voluminous trial exhibits. The parties supplied the district court with transcripts of testimony to support their respective positions, and the court's opinion quotes additional transcript he requested and obtained for evidence he deemed significant.

On appeal, the parties provided the court with a 2257 page joint appendix, which contained everything from the trial court record that either party chose for the court's review. Briefs and oral arguments helped the court focus on particularly significant evidence.

An appellate panel that included two Ohio judges unanimously rejected all the petitioner's contentions, without reaching the respondent's alternative grounds for affirmance or the respondents' conditional cross-appeal. Apparently believing that the case had no meaningful precedential value, the panel recommended against the publication of its *per curiam* opinion.

The petitioner then sought a rehearing *en banc* with a fifteen page brief that makes no reference to any federal claim. When the court circulated the petitioner's motion, none of the fourteen active Sixth Circuit judges favored an *en banc* rehearing.

REASONS FOR DENYING THE WRIT

Nothing in this fact intensive record merits this Court's review. The courts below did not deny Due Process when they applied universally accepted standards for deciding and reviewing the sufficiency of evidence. Petitioner's counsel never asserted a Due Process argument in either court below. Petitioner cannot cite any part of the opinions below which remotely suggests that either court prevented any party from arguing about the significance of any part of the record, or that either court declined to consider the issues carefully. Petitioner simply disagrees with the rulings below.

Contrary to the petitioner's brief, neither court below required the petitioner to file post-trial motions in order to preserve its contentions on appeal. Instead, the court of appeals appropriately declined to consider new arguments that the petitioner failed to assert seasonably in the trial court.

Finally, neither court below denied that a Bank Holding Company Act violation can occur when the related credit transaction is not consummated. Indeed, the district court submitted a Bank Holding Company Act claim to the jury, despite the petitioner's refusal to accept the bank's proposed transaction. Petitioner's counsel has misread the appeals court's opinion, which rejected the petitioner's contention about an allegedly unlawful release when there was no valid claim to release.

If this Court were to grant review, it could not fully resolve the dispute without considering additional issues which the court of appeals had no need to reach, or remanding the case for the

court of appeals to address them. Thus, the respondents asserted there as alternative grounds for affirmance as a matter of law (a) the petitioner failed to show legally cognizable damages, and (b) later events after these parties abandoned any transaction were the real source of the petitioner's claimed damages. Further, the court of appeals never considered the respondents' conditional cross-appeal which complained that the trial court had not ruled on the respondents' alternative motion for a partial new trial.

CONCLUSION

For the reasons stated, the respondents respectfully urge this Court to deny this petition for certiorari. If this Court decides to accept this case, the respondents request the Court to consider the additional issues which the court of appeals did not reach, or in the alternative request this Court to remand the case to the court of appeals for that court to consider those issues.

Respectfully submitted,

/s/ Richard M. Markus

RICHARD M. MARKUS
JEFFREY BADDELEY
Porter, Wright, Morris & Arthur
Attorneys for Respondents
1700 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115
(216) 443-9000

CERTIFICATE OF SERVICE

On September 5, 1996, I mailed a copy of this Brief in Opposition to the Petition for Certiorari to Robert R. Kracht and Scott H. Kahn, McIntyre, Kahn, Kruse & Gillombardo, The Galleria & Towers at Erieview, 1301 E. Ninth Street, Cleveland, Ohio 44114-1824.

/s/ Richard M. Markus

Richard M. Markus
Counsel for Respondents